**APPENDIX**

# In the Supreme Court of the United States

OCTOBER TERM, 1967

## *No. 219*

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

*vs.*

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

**PETITION FOR CERTIORARI FILED JUNE 5, 1967**

**CERTIORARI GRANTED OCTOBER 9, 1967**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

**No. 219**

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THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

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# I N D E X

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## APPENDIX

DOCKET ENTRIES

UNITED STATES COURT OF CLAIMS

APPEALS Case No. APP 8-65

Title of Case
The Peoria Tribe of Indians
of Oklahoma, et al
vs.
THE UNITED STATES

For Plaintiff:
Jack Joseph—Suite 2313
69 West Washington Street
Chicago, Illinois 60602
Attorney of Record
Louis L. Rochmes
of Counsel
For U.S. Craig A. Decker
Attorneys

Appeal from the Indian Claims Commission,
Docket No. 65.

Appeal filed September 14, 1965
Petition Filed .....Copies of Petition to Defendant.
Amount Claimed:

Plaintiff's Address:
Appeals Case No. APP No. 8-65 Peoria

Date Proceedings

September 14, 1965
Record on appeal from the Indian Claims Commission, Dkt. No. 65, filed. Parties notified.

September 14, 1965
Filing fee of $10 paid by appellants.

November 5, 1965
Appellants brief and appendix filed. Copies (10) to U. S.

January 4, 1966
Brief of the United States (Appellee) filed. Copies (10) to appellant.

January 20, 1966
Appellant's reply brief filed. Copies (10) to appellee.

April 29, 1966
Appellant's motion to file supplemental memorandum filed. Copies (2) to appellee. ALLOWED SEE ENTRY OF MAY 16, 1966.

May 9, 1966
Appellee's response to appellant's motion to file supplemental memorandum filed. Copies (2) to appellant.

May 16, 1966
Re Appellant's motion of April 29, 1966: ALLOWED with copies of appellee's response filed May 9, 1966, to be made a part of the record for distribution upon consideration of the case by the Court.

May 16, 1966
Appellant's supplemental memorandum filed. Copies (2) to appellee.

October 3, 1966
Argued and submitted on appeal.

December 16, 1966
The decision of the Indian Claims Commission is affirmed. Opinion by the Chief Judge. Opinion concurring in part and dissenting in part by Judge Davis in which Judge Durfee joins.

December 16, 1966
Certified copy of Court's opinion transmitted to Clerk, Indian Claims Commission, this date.

January 9, 1967
Appellants motion for rehearing filed. Copies (10) to appellee.

January 24, 1967
Appellee's response to motion for rehearing filed. Copy to appellant.

March 17, 1967
See 475-59 for court order denying appellants' motion for rehearing. Copy to parties.

March 17, 1967
Certified copy of court's order transmitted to Clerk, Indian Claims Commission.

May 8, 1967
Record returned to Indian Claims Commission.

May 18, 1967
Appellant's application for certified transcript of the record in re certiorari filed. Copies (3) to appellee, and notice to Indian Claims Commission.

May 23, 1967
Record returned from Indian Claims Commission.

May 26, 1967
Record in re certiorari transmitted to Clerk, United States Supreme Court. $5 fee paid.

June 6, 1967
Petition for certiorari filed in Supreme Court on June 5, 1967, No. 1451, October 1966 Term. Notice to Indian Claims Commission.

October 16, 1967
Supreme Court order Granting Certiorari filed. (dated October 9, 1967).

## AMENDED PETITION FOR GENERAL ACCOUNTING AND OTHER RELIEF

### Jurisdiction

1. The Peoria Tribe of Oklahoma, also and previously known as the Confederated Tribe of Peoria, Kaskaskia, Wea and Piankeshaw Indians, (hereinafter referred to as the Petitioner Tribe) is a tribe of American Indians which now resides in the State of Oklahoma and which, as presently and formerly constituted, has existed since time immemorial.

2. Petitioner Tribe is composed of the Peoria, Kaskaskia, Wea and Piankeshaw Tribes or Nations of Indians (hereinafter referred to as the Petitioner Nations) whose confederation was formally acknowledged by the United States in Article I of the Treaty of May 30, 1854 (10 Stat. 1082). The said Kaskaskia Tribe or Nation is composed of the Kaskaskia, Mitchigamia, Cahokia and Tamarois Tribes which, prior to 1803, merged into and were absorbed by the Kaskaskia Tribe.

3. Petitioner Tribe possesses a Business Committee which is recognized by the Secretary of the Interior as the only tribal organization having authority to represent and act for the Petitioner Tribe, and this action is instituted by and under the direction of the said Business Committee.

4. All of the claims and interests of the Petitioner Nations are vested in and represented by the Petitioner Tribe. No tribal organization other than that of the said Petitioner Tribe is recognized by any department, office, or other agency of the United States Government as having authority to act in the name of the Petitioner Nations. However, in order that a full and final judgment may be rendered on all possible issues in this suit,

Petitioners Guy Froman, a member of the aforementioned Peoria Nation, Fred Ensworth, a member of the aforementioned Kaskaskia Nation, Amos Robinson Skye, a member of the aforementioned Wea Nation, and Mabel Staton Parker, a member of the aforementioned Piankeshaw Nation, appear herein in a representative capacity on behalf of the Petitioner Nations regarding any and all of their claims in which the Petitioner Tribe may not be deemed a true and proper representative.

5. Petitioners are represented in this proceeding by their attorneys, Brown, Dashow, and Ziedman, of One North LaSalle Street, Chicago 2, Illinois, according to the terms of a written contract of employment executed on behalf of the Petitioner Tribe and filed with and approved by the Commissioner of Indian Affairs on December 24, 1948, as Symbol I-1-Ind. 42129 and recorded in Volume 15 of Miscellaneous Records at page 38.

6. Petitioners file the claim asserted herein pursuant to the Act of Congress of August 13, 1946 (60 Stat. 1049), and in accordance with the General Rules of Procedure promulgated by the Indian Claims Commission.

7. The claim presented herein accrued prior to August 13, 1946 and has never heretofore been adjudicated, or acted upon by Congress or by any department of the United States Government except as provided in the Act of May 31, 1900 (31 Stat. 221, 240). No part of the said claim is presently pending before any commission, agency or court of the United States.

8. This Petition for an accounting is made in the light of the aforementioned Act of August 13, 1946, with the intent and purpose that the accounting will fully and completely disclose any and all rights and claims that the Petitioners may have by virtue of any treaty, executive order, or other transaction between the Government of the United States and Petitioners to the fullest extent

possible. In making this request for an accounting the same shall not be interpreted to ratify any such treaty, statute, executive order or other transaction on behalf of the Petitioners or in any way relinquish or waive any right, cause of action, or claim which the Petitioners have or may have pursuant to the terms and provisions of Section 2 of said Indian Claims Act or otherwise.

Treaty Obligations

9. Beginning on August 3, 1795, the Petitioner Nations and the Petitioner Tribe entered into a series of treaties with the Defendant United States of America in which the said Defendant became obligated to make certain payments in money, goods and services to the Petitioners and in which the said Defendant further assumed certain continuing fiduciary responsibilities regarding the administration of Petitioners' funds, property and other assets. The substance of Defendant's said treaty obligations includes, but is not limited to, the following:

A. The Treaty of August 3, 1795 (7 Stat. 49)

(1) Article 4—The Defendant undertook to pay to the Wea Nation the sum of $500 in goods annually. This annunity was due and owing to Petitioners until terminated by the Treaty of October 2, 1818 (7 Stat. 186).

(2) Article 4—The Defendant undertook to pay to the Piankeshaw Nation the sum of $500 in goods annually. This annuity was due and owing to Petitioners until terminated by the Treaty of May 30, 1854 (10 Stat. 1082).

(3) Article 4—The Defendant undertook to pay to the Kaskaskia Nation the sum of $500 in goods annually. This annunity was due and owing to Petitioners until terminated by the Treaty of October 27, 1832 (7 Stat. 403).

B. The Treaty of June 7, 1803 (7 Stat. 74)

(1) Article 4—The Defendant undertook to deliver up to 150 bushels of salt yearly to certain Nations or Tribes, of which the Kaskaskia Nation was one, to be divided among the several tribes in such manner as the General Council of the Chiefs of such Nations or Tribes might determine. This annuity was due and owing to Petitioners until terminated by the Treaty of October 27, 1832 (7 Stat. 403).

(2) Article 4—The Defendant undertook to deliver up to 150 bushels of salt yearly to certain Nations or Tribes, of which the Wea Nation was one, to be divided among the several Tribes in such manner as the General Council of the Chiefs of such Nations or Tribes might determine. This annuity was due and owing to Petitioners until terminated by the Treaty of October 29, 1832 (7 Stat. 410).

(3) Article 4—The Defendant undertook to deliver up to 150 bushels of salt yearly to certain Nations or Tribes, of which the Piankeshaw Nation was one, to be divided among the several Tribes in such manner as the General Council of the Chiefs of such Nations or Tribes might determine. This annuity was due and owing to Petitioners until terminated by the Treaty of October 29, 1832 (7 Stat. 410).

C. The Treaty of August 13, 1803 (7 Stat. 78)

(1) Article 3—The Defendant undertook to pay to the Kaskaskia Nation an additional sum of $500 yearly, either in money, merchandise, provisions or domestic animals, at the option of said Petitioner, free from the cost of transportation or any other contingent expense. This annuity was due and owing to Petitioners until terminated by the Treaty of October 27, 1832 (7 Stat. 403).

(2) Article 3—The Defendant undertook to enclose for the use of the said Nation a field not exceeding 100 acres with a good and sufficient fence.

(3) Article 3—The Defendant undertook to give annually, for seven years, $100 toward the support of a priest of the Catholic religion, who would engage to perform for the said Nation the duties of his office, and also to instruct as many of the Indian children as possible in the rudiments of literature.

(4) Article 3—The Defendant undertook to give the sum of $300 to assist the said Nation in the erection of a church.

D. The Treaty of August 27, 1804 (7 Stat. 83)

Article 3—The Defendant undertook to pay to the Piankeshaw Nation an additional sum of $200 yearly for ten years in money, merchandise, provisions, domestic animals or implements of husbandry, at the option of said Nation.

E. The Treaty of August 21, 1805 (7 Stat. 91)

Article 3—The Defendant undertook to pay to the Wea Nation the additional sum of $250 yearly. This annuity was due and owing to Petitioners until terminated by the Treaty of October 2, 1818 (7 Stat. 186).

F. The Treaty of December 30, 1805 (7 Stat. 100)

Article 3—The Defendant undertook to cause to be delivered yearly to the Piankeshaw Nation an additional sum of $300. This annuity was due and owing to Petitioners until terminated by the Treaty of May 30, 1854 (10 Stat. 1082).

G. The Treaty of October 26, 1809 (7 Stat. 116)

(1) The Defendant undertook to pay to the Wea Nation an additional sum of $300 yearly. This annuity was due and owing to Petitioners until terminated by the Treaty of October 2, 1818 (7 Stat. 186).

(2) The Defendant undertook to pay to the Wea Nation the further sum of $100 yearly if the Kickapoo Tribe of Indians consented to the Ninth Article of the Treaty of September 30, 1809 (7 Stat. 113). As the said Kickapoo Tribe so agreed in the Treaty of December 9, 1809 (7 Stat. 117), this annuity was due and owing to Petitioners until terminated by the Treaty of October 2, 1818 (7 Stat. 186).

H. The Treaty of September 25, 1818 (7 Stat. 181)

Article 4—The Defendant undertook to pay the sum of $300 to the Peoria Nation for 12 years in money, merchandise or domestic animals, at the option of said Nation.

I. The Treaty of October 2, 1818 (7 Stat. 186)

Article 5—The Defendant agreed to pay to the Wea Nation $1850 annually in addition to the sum of $1150 previously owing each year, making a sum total of $3000 to be paid in silver by the Defendant annually. This annuity was due and owing to Petitioners until terminated by the Treaty of May 30, 1854 (10 Stat. 1082).

J. The Treaty of October 27, 1832 (7 Stat. 403)

(1) Article 5—The Defendant agreed to pay to the Kaskaskia and Peoria Nations the sum of $3000 for ten successive years, to be paid either in money, merchandise, or domestic stock, at their option; if in merchandise, to be delivered free of transportation.

(2) Article 6—The Defendant agreed to pay to the Peoria Nation, in common with the Kaskaskia Nation, the sum of $1600.

(3) Article 6—The Defendant agreed to pay to the Kaskaskia Nation alone $350.

(4) Article 6—The Defendant agreed to pay to the Peoria Nation alone $250.

(5) Article 6—The Defendant agreed that there should be paid and delivered to the Peoria and Kaskaskia Nations cows and calves and other stock to the amount of $400, three iron-bound carts, three yoke of oxen and 6 ploughs.

(6) Article 6—The Defendant agreed that there should also be built for said Nations four log houses.

(7) Article 6—The Defendant agreed to pay said Nations the sum of $300 for stated purposes.

(8) Article 6—The Defendant agreed to pay the sum of $50 a year to the Peoria and Kaskaskia Nations for four years for stated purposes.

(9) Article 6—The Defendant agreed that there should also be given to the Kaskaskia Nation certain assistance in moving and provision for one year after removal to the amount of $1000.

K. The Treaty of October 29, 1832 (7 Stat. 410)

(1) Article 3—The Defendant agreed to pay to the Piankeshaw Nation, after the ratification of said treaty, cattle, hogs and farming utensils to the amount of $500 annually for five years.

(2) Article 3—The Defendant agreed to spend the sum of $750 to assist said Piankeshaw Nation in the accomplishment of stated purposes.

(3) Article 4—The Defendant agreed to pay the Wea Nation, after ratification of said treaty, cattle, hogs and farming utensils to the amount of $500.

(4) Article 5—The Defendant undertook to support a blacksmith's shop for five years for the benefit of the Peoria, Wea, Piankeshaw and Kaskaskia Nations in common.

L. The Treaty of May 30, 1854 (10 Stat. 1082)

(1) Article 6—The Defendant agreed to pay the Petitioners the sum of sixty-six thousand dollars as follows: "In the month of October, in each of the years one thousand eight hundred and fifty-four, one thousand eight hundred and fifty-five, and one thousand eight hundred and fifty-six, the sum of thirteen thousand dollars, and in the same month in each of the years one thousand eight hundred and fifty-seven, one thousand eight hundred and fifty-eight, and one thousand, eight hundred and fifty-nine, nine thousand dollars, * * *."

(2) Article 6—Defendant agreed to furnish Petitioners with an interpreter and a blacksmith for five years and to supply the smith shop with iron, steel and tools for a like period.

(3) Article 4—The Defendant agreed to pay to the Petitioners all the moneys arising from the sales of land therein ceded, after deducting therefrom the actual cost of surveying, managing and selling the same. By Article 7 the Defendant agreed, with respect to the annual receipts from said sales, that the President of the United States might from time to time and upon consultation with Petitioners, determine how much of the net proceeds of said sales should be paid to Petitioners and how much should be invested in safe and profitable stocks, the interest to be paid annually to Petitioners or expended for Petitioners' benefit and improvement.

M. The Treaty of February 23, 1867 (15 Stat. 513)

(1) Article 21—The Defendant undertook to receive all proceeds of the sale of a certain nine and one-half sec-

tions of land, described therein, and to hold said proceeds from the first day of June, 1867 for the benefit of Petitioners, subject to the provisions of said treaty, particularly Article 22 thereof, which provided that said proceeds would be used to the extent possible in payment of certain lands to be purchased for Petitioners from the Seneca and Quapaw Tribes. It was further provided in said Article 22 that for the purpose of such payment, other moneys of Petitioners in the hands of the United States might be expended.

(2) Article 24—The Defendant agreed that an examination should be made of the books of the Indian Office and an account current be prepared stating the condition of the funds of Petitioners and that the representation of the Indians for over-charges for sales of their lands in 1857 and 1858 should be examined and reported to Congress.

(3) Article 24—The Defendant, in order further to assist Petitioners in preparing for removal, and in paying their debts, agreed that the further amount of $25,000 should be at the same time paid to them per capita from the sum of $169,686.75 invested for said Indians under the Act of July 12, 1862 (12 Stat. 539)

(4) Article 24—The Defendant further agreed that the balance of said sum of $169,686.75, together with the sum of $98,000, then invested on behalf of the said Indians, in State stocks of southern States, and the sum of $3,700 being the balance of interest, at five per cent per annum, on $39,950 held by the United States from July, 1857 till "vested" (sic) in Kansas bonds in December, 1861, after crediting $5,000 thereon heretofore receipted for by the chiefs of said Indians, should be and remain as the permanent fund of the said tribe, and "five per cent should be paid semi-annually thereon, per capita, to the tribe;" and the interest due upon the sum of $28,500 in Kansas bonds

and upon $16,200 in United States stocks, then held for their benefit, should be paid to the tribe semi-annually in two equal payments, as a permanent school fund income: Provided, that there should be taken from the said invested fund and paid to the said tribe, per capita, on July 1, 1868, the sum of thirty-thousand dollars to assist them in establishing themselves upon their new homes; and at any time thereafter, when the chiefs should represent to the satisfaction of the Secretary of the Interior that an additional sum was necessary, such sum should be taken from their invested fund: And provided also, That the said invested fund should be subject to such division and diminution as might be found necessary in order to pay those who might become citizens their share of the funds of the tribe.

(5) Article 25—The Defendant agreed to take measures to secure the refunding of taxes paid by the Petitioners to the State of Kansas. The Supreme Court of the United States held that these taxes had been levied illegally in *Yellow Beaver* v. *Board of Commissioners,* 5 Wall 757, 18 L. Ed. 673.

(6) Article 27—The Defendant agreed to pay Petitioners the sum of $1,500 per year for six years for their blacksmith, and for necessary iron and steel and tools.

Fiduciary Relationship

10. At all times mentioned herein Petitioners were and still are restricted in the management of their finances and property, and the Defendant was the guardian and trustee of the property and affairs of Petitioners.

11. By virtue of the aforementioned treaties, the Defendant, in addition to promising payments in money, goods and services, agreed to hold funds and other property of the Petitioners in trust and to invest the same and to pay the income thereof or expend the same for the benefit

of the Petitioners and to dispose of property, including lands, of the Petitioners, for their benefit.

12. By virtue of the aforementioned treaties and pursuant to additional agreements, statutes and other official acts, the Defendant also exercised management, dominion and control over funds, property and other assets belonging to the Petitioners, determining the time and manner in which such funds should be credited, expended, or invested and the means by which such property should be administered or disposed of.

13. The books of account and all other records pertaining to the financial affairs, trust funds and trust property of the Petitioners are presently and always have been in the exclusive custody and control of the Defendant.

Failure to Account

14. Defendant has never rendered an accounting of the performance of its fiduciary duties to the Petitioners, except in fulfillment of the limited purposes of Article 24 of the Treaty of February 23, 1867 (15 Stat. 513).

15. Prior to the filing of this Petition, Petitioners, by their counsel, served a written demand upon the Secretary of the Interior to furnish such a general accounting as is sought herein. The Secretary of the Interior has not acceded to such demand.

Breaches of Obligations

16. Petitioners are informed and believe and upon such information and belief state the fact to be that the Defendant has not fulfilled its obligations to them in full, and that a full and complete accounting will disclose that substantial sums remain due and owing to them from the Defendant.

17. Petitioners are informed and believe and upon such information and belief state the fact to be that breaches

of the obligations of Defendant include but are not limited to the following:

(A) Annuity payments in money, goods or services due and owing to the Petitioners were wrongfully withheld, or, although appropriated by the Congress of the United States, were not paid, delivered or performed for the Petitioners by reason of the acts or omissions of agents of the Defendant.

(B) Annuity payments due and owing to the Petitioners were improperly allocated to persons not entitled to receive the same, and other funds held in trust for Petitioners by the Defendant were debited with expenditures for obligations neither authorized by the Petitioners nor properly chargeable to their account.

(C) Funds held by the Defendant in trust for Petitioners were not credited with the interest which should have accrued thereon, or, if so increased, were not credited to the amount or at the rate of interest stipulated under applicable treaties and statutes.

(D) Funds and chattels which should have been held in trust for Petitioners by the Defendant were not properly and completely credited by the Defendant to Petitioners' account.

(E) Lands and other property which should have been held or sold by the Defendant for the benefit of the Petitioners were disposed of by the Defendant without payment therefor to the Petitioners or were sold by the Defendant for prices unconscionably less than the true and fair value thereof.

(F) Lands, funds and other property which should have been alloted or distributed by the Defendant to the Petitioners were improperly retained by the Defendant for its own use and benefit, or otherwise disposed of by the Defendant without the Petitioners' consent.

18. Nothing contained in this Petition is intended by the Petitioners, nor shall anything therein constitute or be interpreted or construed as a ratification, acceptance, affirmance, consent to or approval by or on behalf of the Petitioners of any of the treaties, statutes, executive orders, acts or transactions referred to in this Petition; nor do the Petitioners by the filing of this Petition or by the statements in this Petition contained hereby waive any right, claim or cause of action which Petitioners have had, now have, or may have against the United States. Petitioners expressly reserve the right to make a claim against the United States for damages and other relief over and above any sums found due on the accounting herein prayed for; to claim that any or all of the treaties, statutes, executive orders and other acts or transactions were or are invalid, illegal, unfair, dishonorable, inequitable or otherwise not binding upon Petitioners; and to assert claims against the United States on account of acts or omissions of the United States or its officers, agents, agencies or representatives, irrespective of any limitations, provisions or stipulations contained in any of such treaties, statutes, executive orders or other acts or transactions.

Wherefore, Petitioners pray that the Defendant United States of America be directed to furnish them a full and final statement of all income and disbursements for the account of the Peoria Tribe of Oklahoma and the Peoria, Kaskaskia, Wea and Piankeshaw Indian Nations; and also a full and final statement of all funds and property, real and personal, taken, held or sold by the Defendant in trust for the Petitioners, showing specifically as to each transaction by whom it was authorized, for whose benefit it was undertaken and to whom any payment was made; and also the manner in which lands and other property were allotted or distributed to the Petitioners, as well as the prices for and value of lands sold by the Defendant for

the benefit of the Petitioners; and that the Defendant in particular make disclosure of all such records as they appear in its General Accounting Office, and also as they appear in its General Land Office (now the Bureau of Land Management).

Petitioners further pray for judgment against the Defendant for the amount of money, including the value of services and property, real or personal, and interest properly owing, and also including the difference between the sums received for and the true value of lands sold by the Defendant in trust for the Petitioners, found upon such an accounting to be due and unpaid, after proper allowance for credits and offsets, together with such other and further relief as may to this Commission appear just and equitable.

Second Cause of Action

19. For a second and separate cause of action, the Petitioners reallege each and every allegation contained in Paragraphs 1 through 18 inclusive, and make them a part hereof.

20. At the time of their first contacts with the Defendant, in or about the year 1789, the Petitioners owned lands and resources of great value. Petitioners had then been in contact with white civilization for more than a century, had acquired quantities of munitions, traps, horses and other livestock, and implements, and had learned from white missionaries and traders new methods of hunting, trapping, agriculture, and commerce. Petitioners were deriving large returns from the lands and resources that belonged to them.

21. By a series of acts of the Defendant, the Petitioners by August 13, 1946, had been deprived of all the lands and resources they once owned, and these lands and resources had passed into the hands of the Defendant and its non-Indian citizens.

22. The acts by which this result was accomplished are not fully known to the Petitioners, but are well known to the Defendant. Among said acts were the following:

(a) Defendant by various statutes prevented the Petitioners from selling any of their lands or other property on the open market so as to realize the fair value thereof.

(b) Defendant by various statutes and regulations prevented the Petitioners from hiring their own managers, agents, attorneys and employees to assist in the development and the protection of the lands and resources belonging to the Petitioners and to realize the greatest possible return therefrom.

(c) Defendant exercised complete control over the property of the Petitioners, and after 157 years of such control the Petitioners had nothing, or substantially nothing, left of their original estate. On the other hand, during this period the Defendant paid to its agents large sums in salaries out of the proceeds of the Petitioners' estate, and granted to non-Indian citizens of the Defendant and to various public agencies many millions of dollars worth of the Petitioners' property. The total result of such activities was not to increase the value of the Petitioners' estate but, on the contrary, to reduce it to a tiny fraction of the value this estate had when the Defendant embarked upon its task of management.

(d) During the greater part of the aforesaid period, the Defendant denied to the members of the Petitioner Tribes the rights of citizens and the rights of aliens declaring an intention to become citizens. During the greater part of this period the Defendant extended to such citizens and aliens the right to secure lands and rights in lands, under the public laws, which were denied to the Petitioners and their members.

(e) Prior to the establishment of this honorable Commission on August 13, 1946, Defendant continuously denied

to the Petitioners the same access to any court or tribunal for the purpose of redress of violations of treaties between the Petitioners and the Defendant that was available to non-Indian citizens and aliens with respect to agreements made between them and the Defendant.

(f) Defendant extended to the States of Illinois, Indiana, Kansas, and Missouri jurisdiction over the Petitioners and the members of the Petitioner Tribes, without securing to them any right to participate in the making and enforcement of State laws; Petitioners were consequently denied the equal protection of the laws.

(g) Defendant from time to time, either without the Petitioners' consent or with a consent secured through misrepresentation, fraud, duress, unconscionable consideration, mutual or unilateral mistake, or other improper means, took property belonging to the Petitioners, and utilized or disposed of such property without securing adequate compensation to the Petitioners therefor; and the Defendant, its agents, and its citizens profited from such transactions.

(h) Agents of the Defendant have from time to time during the period from 1789 to 1946 failed to carry out laws, treaties and constitutional provisions designed to safeguard the interests of the Petitioners, and have otherwise, by acts of misfeasance, malfeasance and non-feasance, caused damage to the Petitioners and violated obligations owing to the Petitioners based on law, equity, and standards of fair and honorable dealings.

23. Petitioners are unable at this time to state with greater particularity the facts and claims set forth in Paragraph 22 of this petition, for the reason that the Petitioners have been unable to obtain from the Defendant information under the control of the Defendant bearing upon said claims. Petitioners therefore must rely upon the processes of this honorable Commission to secure the

necessary information to establish with greater particularity the facts set forth in Paragraph 22 of this petition in order to permit the claims there set forth to be heard and determined on their merits.

24. Petitioners finally assert that even if this Commission should determine that the separate acts and transactions set forth by the Petitioners in various petitions hereafter filed, or any of them, fail, considered by themselves, to constitute a cause of action justifying relief under the Act, nevertheless the combination and totality of all such acts and transactions stretching over a period of a century and a half should be held by this Commission to constitute grounds for full and fair compensation for the damage which the Petitioners have suffered as a result of the course of action adopted by the Defendant during the period from 1789 to August 13, 1946.

Wherefore, the Petitioners pray:

That judgment be entered in their favor with respect to the claims herein asserted under the appropriate clause or clauses of Section 2 of the Act in the amount of the damages so sustained.

## ANSWER

Now comes the defendant, by its Assistant Attorney General, and for its answer to the amended petition for a general accounting and other relief filed herein says:

### First Defense

1. The petition fails to state a claim against the defendant upon which relief can be granted.

### Second Defense

2. Answering paragraph 1 of the amended petition, defendant admits that certain Indians claiming to be

Peoria, Kaskaskia, Wea and Piankeshaw Indians now reside in the State of Oklahoma. Except as thus specifically admitted, defendant denies all other allegations.

3. Answering paragraph 2 the defendant admits that on May 30, 1854, it entered into a treaty with Indians designated as the tribes of Kaskaskia and Peoria Indians and of Piankeshaw and Wea Indians but denies all other allegations.

4. Defendant admits that the petitioner designated as the Peoria Tribe of Oklahoma has a Business Committee but denies all other allegations of paragraph 3.

5. Defendant denies all allegations of paragraph 4.

6. Defendant admits that Brown, Dashow and Ziedman are the record attorneys for the petitioner Peoria Tribe of Oklahoma but denies all other allegations of paragraph 5.

7. Answering paragraphs 6 and 7, defendant admits that if petitioners have a valid claim against defendant, it accrued prior to August 13, 1946. Defendant denies, however, that any claim asserted in the petition is a valid claim against defendant. Defendant admits all other allegations of these paragraphs.

8. The allegations of paragraph 8 requires neither admission nor denial.

9. In answer to paragraph 9, and its numerous subdivisions, defendant admits that between August 3, 1795 and February 23, 1867, it entered into a series of 13 treaties with various groups of Indians called the Piankeshaw Tribe, Kaskaskia Tribe, Wea Tribe and Peoria Tribe. It further admits the provisions of each of these 13 treaties and so much of each treaty as is correctly and factually stated in paragraphs marked A, B, C, D, E, F, G, H, I, J, K, L and M and subdivisions, but specifically denies all portions of the said treaties not

correctly and factually set forth in the aforesaid paragraphs. Defendant further specifically denies that any of these 13 treaties was made by the United States with any Indian group called Piankeshaw Nation Kaskaskia Nation, Wea Nation or Peoria Nation.

10. In answer to paragraphs 10, 11 and 12, defendant admits that, because of the peculiar relationship existing between it and the petitioners, defendant does restrict the petitioners to some extent in the management and use of their tribal funds and other property; and that it has exercised such control over petitioners' property for many years, all of which has been in the best interest of petitioners. Defendant alleges, however, that an ordinary guardian or trustee and ward relationship has never existed between it and petitioners. Defendant further says that it has always sought to protect the rights and promote the best interests of the petitioners and has always been fair and honorable in its dealings with them. Defendant denies all allegations of these paragraphs which have not been specifically admitted.

11. Answering paragraph 13, defendant admits that it maintains certain books of account and other records pertaining to the financial affairs, trust funds and trust property of petitioners but denies that it has exclusive custody and control over all such records.

12. Defendant admits the allegations of paragraphs 14 and 15 but, as pointed out in paragraph 13 below, alleges that since the filing of this petition, it has furnished petitioners with a complete accounting.

13. Answering paragraphs 16 and 17, defendant denies that it has failed to fulfill any obligation to petitioners or that it has at any time breached any of its obligations to such Indians. Furthermore, defendant has prepared a separate detailed accounting report as to each of the 13 separate treaties set forth in paragraph 9 and subdivisions of the amended petition each containing in-

formation and data compiled from the records of the General Accounting Office (hereinafter designated as G.A.O.) relating to the funds of the petitioners as well as disbursements made for and on petitioners' behalf by the United States. A copy of each of these 13 G.A.O. accounting reports was made available to counsel for petitioners some time ago and is herewith filed and made a part of this answer. These reports are identified as follows:

(a) Defendant's Exhibit I, G.A.O. Accounting Report on the Treaty of August 3, 1795 (7 Stat. 49) made with the Wea Tribe, the Piankeshaw Tribe and the Kaskaskia Tribe.

(b) Defendant's Exhibit II, G.A.O. Accounting Report on the Treaty of June 7, 1803 (7 Stat. 74) made with the Kaskaskia Tribe, the Wea Tribe and the Piankeshaw Tribe.

(c) Defendant's Exhibit III, G.A.O. Accounting Report on the Treaty of August 13, 1803 (7 Stat 78) made with the Kaskaskia Tribe.

(d) Defendant's Exhibit IV, G.A.O. Accounting Report on the Treaty of August 27, 1804 (7 Stat. 83) made witth the Piankeshaw Tribe.

(e) Defendant's Exhibit V, G.A.O. Accounting Report on the Treaty of August 21, 1805 (7 Stat. 91) made with the Wea Tribe.

(f) Defendant's Exhibit VI, G.A.O. Accounting Report on the Treaty of December 30, 1805 (7 Stat. 100) made with the Piankeshaw Tribe.

(g) Defendant's Exhibit VII, G.A.O. Accounting Report on the Treaty of October 26, 1809 (7 Stat. 116) made with the Wea Tribe.

(h) Defendant's Exhibit VIII, G.A.O. Accounting Report on the Treaty of September 25, 1818 (7 Stat. 181) made with the Peoria Tribe.

(i) Defendant's Exhibit IX, G.A.O. Accounting Report on the Treaty of October 2, 1818 (7 Stat. 186) made with the Wea Tribe.

(j) Defendant's Exhibit X, G.A.O. Accounting Report on the Treaty of October 27, 1832 (7 Stat. 403) made with the Kaskaskia Tribe and the Peoria Tribe.

(k) Defendant's Exhibit XI, G.A.O. Accounting Report on the Treaty of October 29, 1832 (7 Stat. 410) made with the Kaskaskia Tribe, the Wea Tribe, the Piankeshaw Tribe and the Peoria Tribe.

(l) Defendant's Exhibit XII, G.A.O. Accounting Report on the Treaty of May 30, 1854 (10 Stat. 1082) made with the Kaskaskia Tribe, the Wea Tribe, the Piankeshaw Tribe and the Peoria Tribe.

(m) Defendant's Exhibit XIII, G.A.O. Accounting Report on the Treaty of February 23, 1867 (15 Stat. 513) made with the Kaskaskia Tribe, the Wea Tribe, the Piankeshaw Tribe and the Peoria Tribe.

14. Defendant's Exhibit I herein is a G.A.O. Report on the Treaty of August 3, 1795 (7 Stat. 49) made with the Chippewa, Delaware, Eel River Miami, Kaskaskia, Kickapoo, Miami, Ottawa, Piankeshaw, Pottawatomie, Shawnee, Wea and Wyandotte Tribes of Indians. This report consists of 318 pages, with a separate section directed to each Indian Tribe. Sections D (pp. 74-84), H (pp. 144-158) and L (pp. 261-275) thereof are directed respectively to the Kaskaskia, Piankeshaw and Wea Tribes of Indians.

(a) Pages 9, 81 and 82 of this report reveal that the United States disbursed for and on behalf of the Kaskaskia Tribe of Indians pursuant to the Treaty of August 3, 1795, the sum of $12,000.00.

(b) This report also discloses (pp. 9, 151, 153) that the United States disbursed for and on behalf of the

Piankeshaw Tribe of Indians pursuant to the 1795 treaty the sum of $31,318.42.

(c) There is likewise shown at pages 9, 268 and 270 of this report that the United States disbursed for and on behalf of the Wea Tribe pursuant to the 1795 treaty, the sum of $30,318.42.

(d) At pages 293-318 there is set forth a list of appropriations, funds and interest on funds under or from which disbursements were made pursuant to the treaty of August 3, 1795.

15. Defendant's Exhibit II herein is a G.A.O. Report on the Treaty of June 7, 1803 (7 Stat. 74) with the Delaware, Eel River Miami, Kaskaskia, Kickapoo, Miami, Piankeshaw, Pottawatomie, Shawnee and Wea Tribes of Indians. This report consists of 92 pages. Section A thereof (pp. 8-13) is an accounting directed to disbursements made by the United States jointly for all the treaty Tribes. Section D (pp. 46-52) is an accounting directed to disbursements made for the Piankeshaw Tribe of Indians together with information relative to the Kaskaskia and Wea Tribes of Indians, pursuant to the June 7, 1803 treaty.

(a) Pages 6, 10 and 11 of the report disclose that the United States disbursed jointly for the Delaware, Eel River Miami, Kaskaskia, Kickapoo, Miami, Piankeshaw, Pottawatomie, Shawnee and Wea Tribes of Indians pursuant to the treaty of June 7, 1803, the sum of $702.61.

(d) This report also shows (pp. 6, 47, 49, 50) that the United States disbursed for and on behalf of the Piankeshaw Tribe of Indians pursuant to the June 7, 1803 treaty the sum of $680.00.

(c) At pages 87-92 there is set forth a list of appropriations from which disbursements were made.

16. Defendant's Exhibit III herein is a G.A.O. Report on the Treaty of August 13, 1803 (7 Stat. 78) made with

the Kaskaskia Tribe of Indians. This report contains 31 pages which also includes an accounting as to the treaty made with the Peoria Tribe on Indians on September 25, 1818 (7 Stat. 181). The part of the report addressed to the August 13, 1803 treaty is an accounting of the disbursements made by the United States for and on behalf of the Kaskaskia Tribe of Indians pursuant thereto (pp. 6-23).

(a) At pages 16 and 17, this report discloses that the United States disbursed for and on behalf of the Kaskaskia Tribe of Indians pursuant to the Treaty of August 13, 1803, the sum of $12,600.38.

(b) There is set out on pages 30 and 31 a list of the appropriations under which the disbursements were made.

17. Defendant's Exhibit IV is a G.A.O. Report on the Treaty of August 27, 1804 (7 Stat. 83) made with the Piankeshaw Tribe of Indians. This is a letter consisting of nine pages of which only pages 6-9 are directed to the Piankeshaw Treaty of August 27, 1804.

(a) At page 7 of this report it is disclosed that Congress, in providing for the payment of the annuities of $200.00 per year for ten years stipulated in Article 3 of said treaty, appropriated $200.00 annually for ten years, making an aggregate of $2,000.00 for such purposes during the calendar years 1805 to 1814.

(b) The records further disclose that $200.00 was advanced to an Indian Agent for the Piankeshaw annuity for the year 1805.

(c) The sum of $200.00 was advanced and disbursed by an Indian Agent to the Piankeshaws for the year 1808.

(d) The sum of $200.00 was disbursed for the Piankeshaws due in the year 1807.

(e) The sum of $4,620.00 was disbursed by an Indian Agent for annuities of the Piankeshaws, Wea and Dela-

ware Indians in 1802-1809. The $200.00 due the Piankeshaws in 1809 was, no doubt, included in this sum.

(f) The records further disclose that during the years 1816, 1818, a total of $600.00 was disbursed as cash annuity due the Piankeshaws under said Treaty of August 27, 1804, for the years 1812, 1813 and 1814.

18. Defendant's Exhibit V is a G.A.O. Report on the Treaty of August 21, 1805 (7 Stat. 91) made with the Delaware, Eel River, Miami, Pottawatomie and Wea Tribes of Indians. This report consists of 98 pages with a separate section directed to each Indian tribe. Section E thereof (pp. 65-80) is an accounting directed to the disbursements made by the United States for and on behalf of the Wea Tribe of Indians pursuant to the aforesaid treaty.

(a) This report discloses that the United States, pursuant to the Treaty of August 21, 1805, disbursed for and on behalf of the Wea Tribe of Indians, the sum of $15,659.21 (pp. 5, 73, 75).

(b) At pages 81-90 there is set forth a list of appropriations under which disbursements were made.

19. Defendant's Exhibit VI is a G.A.O. Report on the Treaty of December 30, 1805 (7 Stat. 100) made with the Piankeshaw Tribe of Indians. This report consists of 22 pages and is an accounting directed to the disbursements made by the United States for and on behalf of the Piankeshaw Tribe of Indians pursuant to the aforesaid treaty.

(a) This report discloses that the United States, pursuant to the treaty of December 30, 1805, disbursed for and on behalf of the Piankeshaw Tribe of Indians the sum of $18,191.05 (pp. 12, 14).

(b) There is set forth at pages 20 to 22 a list of appropriations under which the disbursements were made.

20. Defendant's Exhibit VII is a G.A.O. Report on the Treaty of October 26, 1809 (7 Stat. 116) made with the Wea Tribe of Indians. This report consists of 170 pages with pages 1-136 thereof directed to the Treaty of September 30, 1809, made with the Delaware, Eel River, Miami and Pottawatomie Tribes of Indians. The part thereof addressed to the Wea treaty of October 26, 1809 (pp. 137-152), is an accounting directed to the disbursements made by the United States, for and on behalf of the Wea Tribe of Indians pursuant to the aforesaid treaty.

(a) This report discloses that the United States pursuant to the Treaty of October 26, 1809, disbursed for and on behalf of the Wea Tribe of Indians, the sum of $23-954.44 (pp. 145, 147).

(b) There is set forth a list of appropriation funds and interest on funds under or from which disbursements were made (pp. 153-170).

21. Defendant's Exhibit VIII is a G.A.O. Report on the Treaty of September 25, 1818 (7 Stat. 181) made with the Peoria Tribe of Indians. This report consists of 31 pages with pages 6 to 23 thereof directed to the Treaty of August 13, 1803, made with the Kaskaskia Tribe of Indians. The portion of this report addressed to the Treaty of September 25, 1818, made with the Peoria Tribe of Indians is an accounting directed to the disbursements made by the United States for and on behalf of the said Peoria Tribe of Indians pursuant to the aforesaid treaty (pp. 24-29).

(a) This report discloses that the United States, pursuant to the Treaty of September 25, 1818, disbursed for and on behalf of the Peoria Tribe of Indians, the sum of $3,600.00 (pp. 27-29).

(b) On pages 30 and 31 there is set forth a list of appropriations under which disbursements were made

pursuant to the Treaties of August 13, 1803 and September 25, 1818.

22. Defendant's Exhibit IX is a G.A.O. Report on the Treaty of October 2, 1818 (7 Stat. 186), made with the Wea Tribe of Indians. This report is a letter consisting of 10 pages, and is an accounting directed to the disbursements made by the United States for and on behalf of the Wea Tribe of Indians, pursuant to the Treaty of October 2, 1818.

(a) This report discloses that the United States, pursuant to the terms of this treaty, disbursed for and on behalf of the Wea Tribe of Indians the sum of $98,949.16 (pp. 6-9).

23. Defendant's Exhibit X is a G.A.O. Report on the Treaty of October 27, 1832 (7 Stat. 403) made with the Kaskaskia and Peoria Tribes of Indians. This report consists of 225 pages which, in addition to that portion directed to the October 27, 1832 treaty with the Kaskaskia and Peoria Tribes consists of accountings as to other acts and treaties. The part addressed to the Treaty of October 27, 1832 (pp. 13-29), is an accounting directed to the disbursements made by the United States for and on behalf of the Kaskaskia and Peoria Tribes of Indians pursuant to said treaty.

(a). This report discloses that the United States, pursuant to the Treaty of October 27, 1832, disbursed for and on behalf of the Kaskaskia and Peoria Tribes of Indians, the sum of $36,088.37 (pp. 4, 18, 20).

(b) The lands ceded by this treaty are indefinite. The cession by the Kaskaskias was the tract reserved to them by article 1 of the Treaty of August 13, 1803, (7 Stat. 78), the boundaries of which were not ascertained. The Peorias ceded and relinquished all their claims to lands reserved by or assigned to them, in former treaties, either in the State of Illinois or the State of Missouri (p. 15).

(c) At pages 205-225 there is set forth a list of appropriations and funds under or from which disbursements were made.

24. Defendant's Exhibit XI is a G.A.O. Report on the Treaty of October 29, 1832 (7 Stat. 410) made with the Piankeshaw, Wea, Kaskaskia and Peoria Tribes of Indians. This report consists of 225 pages with Section D thereof (pp. 30-52) directed to the instant treaty, as an accounting addressed to the disbursements made by the United States for and on behalf of the Kaskaskia, Piankeshaw, Wea and Peoria Tribes of Indians pursuant to said treaty of October 29, 1832.

(a) This report discloses that the United States, pursuant to this treaty, disbursed for and on behalf of the four tribes above set forth the sum of $9,714.98 (pp. 4, 34, 38).

(b) The lands ceded by this treaty are indefinite. The Piankeshaws and Weas ceded and relinquished all their right, title and interest to and in lands within the States of Missouri and Illinois (p. 31).

(c) At pages 205-225 there is set forth a list of appropriations and funds under or from which disbursements were made.

25. Defendant's Exhibits XII and XIII are a G.A.O. Report on the Treaty of May 30, 1854 (10 Stat. 1082), made with the Confederated Tribe of Peoria, Kaskaskia, Wea and Piankeshaw Indians. This report consists of 225 pages with Section F thereof (pp. 56-197) set forth as an accounting directed to the disbursements made by the United States for and on behalf of the Confederated Tribe of Peoria, Kaskaskia, Wea and Piankeshaw Indians, pursuant to the Treaties of May 30, 1854, February 23, 1867, and the Acts of March 3, 1863, June 24, 1864, March 3, 1873, March 3, 1875, August 15, 1876, March 3, 1877, March 3, 1881, August 5, 1882, October 2, 1888, October 19, 1888, March 2, 1889, March 3, 1891, and May 31, 1900.

(a) Pages 95 and 96 of this report disclose that the United States, pursuant to the Treaty of May 30, 1854 and the Acts of March 3, 1863 and June 24, 1864, disbursed for and on behalf of the Confederated Tribe of Peoria, Kaskaskia, Wea and Piankeshaw Indians, the sum of $255,138.96.

(b) Pages 96-99 of this report also show that the United States, pursuant to the Treaty of February 23, 1867 and the Acts of March 3, 1873, March 3, 1877; March 3, 1875, August 15, 1876, March 3, 1881, August 5, 1882, October 2, 1888, October 19, 1888, March 2, 1889, March 3, 1891, and May 31, 1900, disbursed for and on behalf of the Confederated Tribe of Peoria, Kaskaskia, Wea and Piankeshaw Indians, the sum of $595,428.64.

(c) Pages 200 and 201 of this report, Section G, disclose that the United States, pursuant to the Acts of March 2, 1889 and May 27, 1902, disbursed for and on behalf of the said Confederated Tribes the sum of $16,033.02.

(d) Page 203 of this report, Section H, further discloses that the United States disbursed for and on behalf of the said Confederated Tribes, pursuant to the Act of March 3, 1909, the sum of $565.00.

(e) Page 94 of this report, in conjunction with pages 66-69 thereof, discloses that the sum of $70,820.00 disbursed by the United States for and on behalf of said Confederated Tribes in payment of the permanent annuities of $3,800.00 commuted by Article 6 of the 1854 treaty, has not been included as a disbursement in this report, but has been segregated into the proportionate amounts chargeable to treaties under which the permanent annuities accrued (pp. 68, 94), as follows:

(1) $18,636.84 for the Treaty of August 3, 1795.

(2) $4,659.21 for the Treaty of August 21, 1805.

(3) $5,591.05 for the Treaty of December 30, 1805.
(4) $7,454.74 for the Treaty of October 26, 1809.
(5) $34,478.16 for the Treaty of October 2, 1818.

(f) As to the petitioners' claim that by Article 25 of the Treaty of February 23, 1867, the defendant agreed to take measures to secure the refunding of taxes paid to the State of Kansas by petitioners under an illegal levy (*Yellow Beaver* v. *Board of Commissioners,* 5 Wall. 757, 18 L. Ed. 673), the records of the General Accounting Office fail to disclose any information relative to the payment of taxes by the petitioners, or the refunding by the State of Kansas (p. 93).

(g) At pages 205-225 there is set forth a list of appropriations and funds under or from which disbursements were made.

26. In addition to the treaty accountings and disbursements thereunder for the Kaskaskia, Wea, Piankeshaw and Peoria Tribes of Indians set forth in paragraphs 14 to 25, inclusive, of this answer, the defendant has prepared a detailed report of 186 pages containing information and data compiled from the records of the General Accounting Office relating to funds of the said Kaskaskia, Wea, Piankeshaw and Peoria Tribes of Indians and the disbursements made by the United States for and on behalf of these Indians under other than treaty appropriations, from August 3, 1795 to June 30, 1951. A copy of this report was made available to counsel for petitioners some time ago and is herewith filed and made a part of this answer as "Defendant's Exhibit 14."

(a) This gratuity report discloses that the United States disbursed for and on behalf of these four Indian tribes under other than treaty appropriations frrom August 3, 1795 to June 30, 1951, the sum of $123,270.91 (pp. 6, 7, 12, 14, 20, 22, 31, 33, 57, 60, 100, 102, 116, 118, 130, 132, 138, 140, 151, 153, 169, 170, 176, 178, 182 and 184).

(b) No items of disbursement set out in this report were made pursuant to the stipulations of any treaty, contract or agreement, nor have any items been included which clearly fall within the categories which Congress has declared in section 2 of the Act of August 13, 1946 "shall not be a proper offset against any award." (p. 2.)

27. The allegations of paragraph 18 require neither admission nor denial.

## Second Cause of Action

28. Defendant denies all allegations of paragraphs 19, 20, and 21, and realleges herein all allegations of paragraphs 1 through 27 of this answer.

29. Answering paragraphs 22, 23 and 24, the defendant denies all allegations thereof. It alleges that a complete, detailed and accurate accounting of all its dealings with the Kaskaskia, Wea, Piankeshaw and Peoria Tribes of Indians from August 3, 1795 to June 30, 1951, has been set forth in the separate accounting reports contained in paragraphs 14 to 25, inclusive, of this answer. Copies of each of these reports have been made available to counsel for the petitioners some time ago, as was a copy of the gratuity report set forth in paragraph 26 of this answer.

30. Defendant further alleges that the aforesaid accounting reports prepared by the defendant disclose conclusively that from August 3, 1795 to June 30, 1951, the defendant has always sought to protect the rights and promote the best interests of the Kaskaskia, Wea, Piankeshaw and Peoria Tribes of Indians and has always been fair and honorable in all its dealings with these Indians; and that the said reports show clearly that the defendant has accounted, accurately, completely and in detail as to all its treaty and nontreaty dealings with petitioners.

Wherefore, the defendant, having accounted fully, completely and accurately for all its treaty obligations with the Kaskaskia, Wea, Piankeshaw and Peoria Tribes of Indians in the sum of $1,100,625.72, as well as for additional disbursements made for these tribes under other than treaty obligations in the sum of $123,270.91, prays that the petitioners recover nothing in this action and that the amended petition be dismissed.

## DECISION OF THE INDIAN CLAIMS COMMISSION, MARCH 17, 1965

### FINDINGS OF FACT

The Commission makes the following findings of fact:

#### Claim II

16. The cause of action presently under consideration, designated as Claim II, involves the allegation that defendant failed to comply with the provisions of Article 4 of the Treaty of May 30, 1854 (10 Stat. 1082) requiring that the petitioners' land be sold by the United States on a freely competitive market, with the proceeds to be paid to the Indians but rather permitted non-Indian citizens to trespass upon the land and to purchase the land at artificially low appraised values, far below market price.

17. The lands involved are located in eastern Kansas and were owned by petitioners having been granted to them under the Treaties of October 27, 1832 (7 Stat. 403) and October 29, 1832 (7 Stat. 410). The lands involved have been described by Charles C. Royce on his Kansas Map 2 in the 18th Annual Report of the Bureau of American Ethnology (Part II) Indian Land Cessions as areas 326, 327 and 328.

18. The Treaty of May 30, 1854, provided for the cession to the United States of the tracts granted and as-

signed under the 1832 Treaties, reserving therefrom 160 acres for each member of the tribe and ten sections additional to be held as the common property of the tribe. There was also a grant of 640 acres to the American Indian Mission Association. The treaty provided for a survey of the lands ceded and selection of the allotments to the individual Indians and to the tribe.

Article 4 of the treaty provided:

> After the aforesaid selections shall have been made, the President shall immediately cause the residue of the ceded lands to be offered for sale at public auction, being governed in all respects in conducting such sale by the laws of the United States for the sale of public lands, and such of said lands as may not be sold at public sale, shall be subject to private entry at the minimum price of United States lands, for the term of three years; and should any thereafter remain unsold, Congress may, by law, reduce the price from time to time, until the whole of said lands are disposed of, proper regard being had in making the reduction to the interests of the Indians and to the settlement of the country. And in consideration of the cessions hereinbefore made, the United States agree to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same.

Article 8 of the Treaty provided that citizens of the United States, or other persons not members of the petitioner tribe, should not be permitted to make locations or settlements in the ceded area until after the selections had been made by the Indians.

The treaty was duly ratified on August 2, 1854, and proclaimed August 10, 1854.

19. On the same day that the Peoria treaty was executed, May 30, 1854, legislation was enacted organizing the two territories of Kansas and Nebraska, (10 Stat. 277).

The Act of July 22, 1854, (10 Stat. 308) extended the provisions of the pre-emption law to lands in Kansas and Nebraska "to which the Indian title has been or shall be extinguished." The right of preemption meant that the first settler on a quarter section or less of public lands acquired a priority right to the tract and could acquire title thereto at the minimum government price, $1.25 per acre, at any time prior to the public sales.

20. Following the execution of the Peoria treaty a number of settlers, investors, and speculators "squatted" on the ceded lands. On December 7, 1855, Indian Agent McCaslin reported on the settlers located within the Peoria area, and the evidence contains a number of references to the extensive "settlements" being made and difficulties encountered by the government officials. However, it does not appear that the settlers interfered with the Indian selections or settled on any of the land to be taken by the Indians. Agent McCaslin wrote on May 20, 1856, "it is true that none I believe, remain, or occupy the lands intended to be selected by the Indians" (Pet. Ex. 117).

21. Following the extension of the pre-emption laws to Kansas lands, July 22, 1854, there arose a controversy concerning the possible application of those laws to the Peoria lands as well as to the lands ceded under similar treaties by the Delaware and Iowa Indians. The settlers were, of course, desirous of obtaining the lands under the pre-emption laws. At the request of the Secretary of the Interior the Attorney General of the United States entered an opinion, dated August 14, 1854, in which he stated:

> The right of pre-emption, accorded by the act of 1854, does not extinguish by repeal reservations belonging to the United States; no more does it extinguish any special rights reserved to the Delawares, Ioways, and Weas [Peorias].

> Beyond this, to grant pre-emptions of the lands ceded by the Delawares, Ioways, and Weas, and condition, and upon trust, to be sold at public auction for their account and benefit, would be a violation of the treaties, a breach of trust, a fraud upon the Indians. * * * (Pet. Ex. 166 J-1, pp. 25, 26)

22. By Act of March 3, 1855 (10 Stat. 686) Congress appropriated $20,000.00 to "enable the President of the United States to carry, out, in good faith, the recent treaties with the . . . Pearias." The money was to provide for the required surveys and to classify and value all lands to be offered. After such classification and valuation had been made to the satisfaction of the President, "he shall cause said lands to be offered at public sale, by legal subdivisions or town lots, at such times and places, and in such manner and quantity, as to him shall appear proper and necessary to carry out faithfully the stipulations in said treaties; and said lands shall not be sold at public or private sale for a less price than that fixed by the valuation aforesaid, nor shall any land be sold at a less price than one dollar and twenty-five cents per acre, for three years, and thereafter as may be directed by law pursuant to the treaty." (10 Stat. 686, 700)

23. On April 11, 1856, commissioners were appointed to make the appraisals. By letter dated April 16, 1856, the commissioners were instructed to consider the eligibility and quality of the lands, their proximity to water courses, timber, roads and other advantages, position with reference to town sites, and any other causes which would add to the value. However, the lands were to be appraised without any improvements which had been made on them, although improvements on adjacent, non-trust lands were to be considered. If any lands had deteriorated in value by acts of the settlers, such lands were to be appraised as if in their original condition.

24. The lands were inspected by the commissioners in June, 1856. The Indian Agent at the Osage River Agency, Mr. McCaslin, reported specific objections concerning the appraisals. Among his objections were the failure of the appraisers to have plats of the trust lands, lack of an opportunity for the Indian agent and Batties (Baptiste) Peoria (U. S. interpreter) to check the appraisals, the slight view given the tract (allegedly 350,000 acres[1] were appraised in 6 hours), and reliance by the appraisers on surveyors' classifications.

The appraisal of a total of 208, 585.69 (after removal of the Indian selections) showed the following classifications:

| Classification | Acreage | Value |
|---|---|---|
| 1st Class | 119,662.17 | $1.50-$2.00 |
| 2nd Class | 76,563.52 | $1.25-$2.00 |
| 3rd Class | 12,360.00 | $1.25 |
| | | (Pet. Ex. 173) |

On January 3, 1857, the appraisal commissioners were advised that the appraisements were not satisfactory to the President, and the commissioners were directed to review and increase the rates. The commissioners adjusted their figures by adding twenty-five cents per acre to all of the lands appraised.

25. Robert S. Stevens was appointed a special commissioner to superintend the sale and, by letter dated May 15, 1857, received his instructions. All tracts were to be offered in the same sized parcels in which they had been classified and appraised and were to be sold for not less

[1] It appears that since all the Indian allotments had not been selected at the time of the appraisals the entire area was appraised and those parcels later selected by the Indians were then deleted.

than the appraised value. The government was, of course, well aware of the many settlers who had already entered the area and expected to obtain the lands upon which they had "squatted." It was obvious too that many land speculators were awaiting the sale and it was clear that the sale was likely to occur in a tense, emotional atmosphere. The instructions indicated that troops at Fort Leavenworth were to be ready to provide military assistance should they be necessary for the safe and proper conduct of the sales. Commissioner Stevens was instructed that:

• • •

> If it shall come to your knowledge that combinations or arrangements have been entered into by speculators or other class of persons, calculated to obstruct a fair scale of these lands, or if you shall have reason to suspect such combinations, it will be your duty to make proper enquiries in regard to the same, and to endeavor by firmness and discretion to meet and over come them.
>
> The government can have no sympathy with the speculator who would seek by bidding more than a fair value for the land without its improvements, to possess himself of the earnings and labor of an individual who may have entered upon a quarter section of these lands and made lasting and valuable improvements thereon; but all persons thus situate and having such improvements should be slow to enter into combinations with a view to their own protection with the class of persons referred to.
>
> It is to be presumed that in cases where *bona fide* settlers have made lasting and valuable improvements on the lands and who reside therein, the price fixed by the commissioners will be considered the fair value of the land, unless such persons shall have before claimed the benefits of a settlement and improvement upon Indian lands of a similar character, in which case they are not to be treated as *bona fide* settlers, nor are their claims entitled to any more respect than

would be extended under the preemption laws to persons who should for the second time claim the benefit of them, which is expressly forbidden. But with reference to all unimproved lands, a fair and lively competition should be encouraged, and if you have reason to believe that any combinations exist to prevent such competition, you will, in the exercise of a sound discretion postpone the sale from day to day until the cause ceases, and if this does not occur within a reasonable time, you will postpone the sale indefinitely, and report the facts without delay to this Office. It is however to be observed that every effort and all diligence should be used in order to have the sale proceed, and continue without interruption, until all the lands have been offered for sale. * * (Pet. Ex. 146, pp. 4, 5).

26. Prior to the sale, by letter of June 4, 1857, Indian Agent McCaslin informed his superior of his concern, stating "almost every quarter section of the lands to be sold, has an improvement of some discription (sic) on it, for the purpose of fending off competition to get the land at the appraisment (sic). There are a few *bonafide* Settlements—houses built—ground fenced and occupied by families; but the great majority of the improvements are mere foundations, and little temporary Shanties built of *poles* without any person occupying them. By this means those persons expect to be exclusive bidders by means of a combination." (Pet. Ex. 148, p. 2)

The Indians likewise expressed their concern in a letter dated June 11, 1857. Referring to the sale of the trust lands, the letter, signed by 26 Indians, Chiefs and Headmen of the Confederated Kaskaskias, Peorias, Piankeshaws and Weas, stated:

* * *

You will see by reference to that Treaty that it is expressly and distinctly stipulated in the Act that the residue of the lands after the special and na-

tional reservations shall have been selected are to be sold at "Public Auction" and when the Commissioner on the part of the Govt assured us and pledged the honor of the Govt that this stipulation be faithfully carried out we believed him, we believed that our Great Father the President would not deceive us or think it worth while to take the trouble to use any stratagem to induce us to put our signatures to a Treaty when we knew that he had the power to take all of our lands from us by force without any compensation whatever. all that we wish or have a right to ask is that the land may be sold at Public Auction as stipulated, not by such solemn mockeries as were enacted at the sales of Delaware and Ioway trust lands. But if such must be the case, it will be evident, that it would be much better for us that there be no public sales whatever of the lands but that every person who desires to obtain any of these trust lands should be allowed to take them by paying the valuation which the Govt has seen proper to fix upon them, as it would thereby save us of all the heavy costs of a public sale without giving us the remotest chance of being in the least benefited by it.—

* * *

It may be our fault and partly our misfortune that our once numerous people have now dwindled to a mere handful and it certainly is not our fault that the lands upon which we were placed and which were pleged to us as a permanent home forever have become valuable and desired by our white neighbors. We are even willing to concede that those families or persons who have built houses and made farms with an undoubted intention of making it their permanent future home should be allowed to take one quarter section upon which they reside at the valuation fixed by the Govt at the same time we deny that they have any right whatever under the Treaty which we conceive to be the only law governing this case. But we are willing to make this concession only upon the condition that such person and family shall have been

residing there on the 1st day of June 1857 the number of such settlers even up to this date within fourteen days of the sales is but small, whilst a large proportion of the lands proposed to be gone through by the formalities of a Public Auction, are claimed by non resident speculators, who have no intention of becoming settlers any longer than they can find purchasers of the four poles, or stakes with names on them.

* * *

(Pet. Ex. 149, pp. 2-4)

27. The sale of the Peoria lands was conducted from June 24, 1857, to July 13, 1857. The total acreage sold was 207,758.85 acres for a total sum of $346,671.09. This was an average per acre consideration of $1.67.

28. Under the provisions of Article 4 of the 1854 Treaty the defendant became obligated to cause "the residue of the ceded lands to be offered for sale at public auction." In undertaking to thus sell the lands and to pay the net proceeds to the Indians the United States became a fiduciary with respect to petitioners. By its actions in permitting "settlers" to purchase much of the land at the appraised prices, the defendant breached its duty to the petitioners.

The Commission finds that the petitioners are entitled to recover from defendant the difference in the prices paid for the lands sold in 1857 and the fair market value which could have been obtained if each of the parcels had been sold at public auction.

29. The lands involved are located in eastern Kansas within the present day counties of Miami and Franklin. The eastern border is the Kansas-Missouri state line. The tract is generally rectangular extending some fifteen miles north and south (along the Kansas-Missouri line) and some thirty miles east and west.

30. The Marais des Cygnes River flows through the southwest corner of the subject area and enters it again for a short distance along the middle of the southern boundary. Big Bull Creek flows southerly through the center of the tract with South and North Wea Creek watering the northeastern portion of the area.

31. Most of the area is comprised of uplands with gently rolling hills. The area is included within the "east central prairies section" classification with a small area of "river flood plains and low terraces" classification in the valley of the Marais des Cygnes River. The "east central prairies section" is described by Claude L. Fly in the *Natural Agricultural Resource Areas of Kansas, Soil Conservation in Kansas*, Report of the Kansas State Board of Agriculture, Vol. LXV, No. 271, February, 1946, as follows:

"Average rainfall ranges from thirty-five to thirty-nine inches west to east, growing seasons range from 180 to 190 days, and average annual temperatures from fifty-five to fifty-seven degrees. Extended dry summer periods with temperatures of 100 degrees or more are common. Summer nights are warm. Winters are moderate. Extremely heavy downpours cause frequent floods in late spring and early summer, and occasionally at other times.

"The dominant soils suitable for cultivation are on smooth to gently rolling uplands. They have brownish gray to nearly black granular silty clay loam surface soils with dark tight clay, and claypan subsoils which are derived from shales and shaly clays. Similar soils are on nearly level terraces and slowly drained areas along the outer river bottoms. Their fine texture and heavy consistency make them very slowly permeable and the subsoils restrict the plant root growth. They have high water storage capacity, but release water slowly to plants . . . In the eastern part, native mixed hardwoods occupy most

of the rugged slopes and breaks and the bottomlands which have not been cleared for cultivation . . . The likelihood of wells going dry during dry summer periods makes storage of surface water almost imperative" (Commission's Ex. 7, pp. 180-183).

The valley of the Marais des Cygnes River, the widest of the valleys, averages about two miles in width and most of the bottom land in the area is located in that valley. The native timber grows along the creeks is belts averaging about one-half mile in width. Timbered areas occupy about 10% of the surface and open prairie the remaining 90%. The area contains good limestone in almost every locality.

32. In 1857 there were no railroads in the area. The Fort Leavenworth-Fort Scott Military road passed through the eastern portion of the tract running north and south. The northern boundary of the area was about 25 miles south of Kansas City where the Kansas River joins the Missouri River. The Santa Fe Trail running east and west was just to the north of the area.

33. The highest and best use for the tract was for farming, a use for which the entire area was well suited.

34. At the time of the sales of the subject lands, June and July, 1857, there was great activity and interest in lands in eastern Kansas. Kansas was in a period of rapid population growth and land values were rising.

35. Petitioners have placed in evidence a record of all first resales of the lands involved. Petitioners have tabulated those sales by year (from 1857 through 1860 and by 10 year periods through 1900 and, finally, all sales after 1900) for both Miami and Franklin Counties. By petitioners' calculations the sales for 1857 through 1860 were as follows:

**Miami County**

| Year | Acres Resold | Average Price per acre | Original Average price per acre |
|---|---|---|---|
| 1857 | 10,701.58 | $3.44[2] | $1.65 |
| 1858 | 12,496.06 | 4.49 | 1.62 |
| 1859 | 13,612.74 | 4.58 | 1.67 |
| 1860 | 5,463.14 | 5.01 | 1.67 |

**Franklin County**

| | | | |
|---|---|---|---|
| 1857 | 3,385.00 | 5.34[2] | 1.80 |
| 1858 | 5,619.71 | 6.03 | 1.79 |
| 1859 | 3,885.40 | 4.11 | 1.79 |
| 1860 | 1,556.83 | 5.13 | 1.76 |

(Petitioners' Supplementary Proposed Findings of Fact . . . pp. 5, 6)

For those parcels resold in 1857 the original average per acre sales price had been $1.68 (approximately the same as the $1.67 average price for which all the lands originally sold). For the year 1857, 14,086.58 acres were resold for a total consideration of $54,897.66. This was an average per acre price of $3.90 or approximately 2.318 times the average consideration received at the public sales.

[2] We have calculated the 1857 figures and they differ slightly from petitioners, though not to any significant degree. We have not checked the figures for sales after 1857.

The Commission has calculated the 1857 resales data as follows:

Miami County

10,515.06 acres
$36,458.00
Average $3.46 per acre

Franklin County

3,658.70 acres
$20,400.00
Average $5.57 per acre

Total

14,173.73 acres
$56,858.00
Average $4.01 per acre

For purposes of analyzing the 1857 resale data we have utilized, by necessity, our figures, which in any event are slightly higher than petitioner.[3]

[3] We are aware of some of the reasons for the different figures. For example petitioners list one Miami County sale on August 1, 1857 as 160 acres for $120.00 or an average of $0.75 per acre. The property involved was an undivided ½ interest in the southwest quarter section 26 Township 17 South, Range 21 East—Book A, p. 192 (Pet. Ex. 176). The acreage computation should have been 80 acres. We found one transaction on September 25, 1857, involving 160 acres for $400.00 or an average of $2.50 per acre, listed twice.

36. The average per acre prices paid for the resales made in 1857 in both Miami and Franklin Counties, arranged in ascending order from $1.17 to $31.18, were as follows:

| Miami | Franklin | Miami | Franklin |
|---|---|---|---|
| $1.17 | | $2.13 | |
| | $1.25 | 2.19 | |
| 1.50 | | 2.25 | |
| 1.50 | | 2.25 | |
| 1.50 | | 2.28 | |
| 1.50 | | 2.34 | |
| 1.50 | | 2.36 | |
| | 1.50 | 2.37 | |
| | 1.50 | 2.50 | |
| | 1.63 | 2.50 | |
| | 1.63 | 2.50 | |
| 1.75 | | 2.50 | |
| 1.75 | | 2.50 | |
| 1.75 | | | |
| 1.75 | | | $2.50 |
| 1.75 | | 2.56 | |
| 1.75 | | 2.65 | |
| 1.75 | | 2.66 | |
| 1.75 | | 2.69 | |
| | 1.75 | 2.71 | |
| 1.81 | | 2.75 | |
| 1.81 | | 2.81 | |
| 1.81 | | 2.88 | |
| 1.86 | | 2.97 | |
| 1.87 | | 3.00 | |
| | 1.88 | 3.00 | |
| | 1.88 | 3.00—Miami County median | |
| | 1.88 | 3.00 | |
| | 1.88 | 3.00 | |
| | 2.00 | 3.00 | |
| | 2.00 | 3.00 | |
| | | —(Median all resales) | |
| | | 3.06 | |

| Miami | Franklin | Miami | Franklin |
|---|---|---|---|
| | 3.13 | | 4.98 |
| 3.13 | | 5.00 | |
| 3.13 | | 5.00 | |
| 3.13 | | 5.00 | |
| 3.13 | | | 5.00 |
| 3.13 | | | 5.00 |
| 3.13 | | | 5.63 |
| 3.13 | | 6.13 | |
| 3.16 | | | 6.25 |
| 3.22 | | 6.25 | |
| | 3.23 | 6.25 | |
| 3.44 | | | 6.66 |
| | 3.50 | 6.89 | |
| 3.50 | | | 7.00 |
| 3.50 | | 7.29 | |
| 3.50 | | 7.50 | |
| 3.50 | | | 10.00 |
| 3.50 | | | 10.00 |
| 3.50 | | 10.00 | |
| | 3.53 | 10.00 | |
| | 3.75 (Franklin County Median) | 10.00<br>10.27 | |
| 3.75 | | 11.00 | |
| 4.00 | | | 12.50 |
| | 4.00 | | 12.50 |
| 4.04 | | | 12.50 |
| 4.06 | | | 15.00 |
| 4.20 | | | 15.00 |
| 4.21 | | | 25.00 |
| 4.21 | | | 31.18 |

Miami County 1857 sales
Arithmetic average—$3.46
Median average —$3.00

Franklin County 1857 sales
Arithmetic average—$5.57
Median average —$3.75

All 1857 sales

Arithmetic average—$4.01
Median average —$3.03

37. The Commission finds that the median average consideration per acre for all the 1857 resales was $3.03. It is apparent that the higher arithmetic average of $4.01 per acre resulted in large from the few sales at relatively large average per acre prices. For example the elimination from the analysis of the fourteen transactions for prices averaging $10.00 per acre or more would have reduced the acreage and consideration figures as follows:

| | Acres | Consideration | Average Consideration |
|---|---|---|---|
| | 40 | $ 600.00 | $15.00 |
| | 120 | 1,500.00 | 12.50 |
| | 80 | 800.00 | 10.00 |
| | 160 | 2,000.00 | 12.50 |
| | 96.32 | 3,000.00 | 31.18 |
| | 30 | 300.00 | 10.00 |
| | 80 | 2,000.00 | 25.00 |
| | 20 | 300.00 | 15.00 |
| | 50 | 625.00 | 12.50 |
| | 160 | 1,600.00 | 10.00 |
| | 160 | 1,600.00 | 10.00 |
| | 50 | 550.00 | 11.00 |
| | 14.61 | 150.00 | 10.27 |
| | 160 | 1,600.00 | 10.00 |
| Total | 1,220.93 | $16,625.00 | |
| | — 1,220.93 | — 16,625.00 | |
| | 14,173.73 | $56,858.00 | |
| | 12,952.80 acres | $40,233.00 | |

Average per acre—$ 3.11

These fourteen transactions at prices which would indicate that the sales probably included substantial im-

provements had the effect of raising the arithmetic average from $3.11 per acre to $4.01 per acre.

38. The Commission has examined the locations of all the 1857 resales within the subject area. There are resales located, in general, in all portions of the tract. There is, however, a heavier concentration of sales to the west of Paola and, in particular, in the Marais des Cygnes River valley (Commission's Exhibit No. 1).

It also appears that most of the transactions at considerations averaging $10.00 per acre or more were located in the southwestern portion of the tract through which the Marais des Cygnes River flowed. Of the fourteen such sales, eight were located in Township 17 South, Range 21 East. That township was surveyed in May, 1856, slightly over a year prior to the sales of the subject tract. The surveyor found the land to have been "first rate" with wide, rich bottom lands along the river. The village of Stanton was located in the northwest corner of the southeast quarter section of Section 26.[4] The surveyor noted "the Village of Stanton is situated in this Township and contains a population of about 50 souls, a very respectable store, a blacksmith shop and other Machanics (sic) and is a general trading place for the settlers of the surrounding country" (Commission's Exhibit No. 5). Further, the surveyor made a number of references in his detailed notes to the presence of such improvements as cornfields, wheat fields and gardens. (Commission's Exhibit No. 6). And the survey map contains sketched outlines of such improvements throughout Township 17 South, Range 21 East (Commission's Exhibit No. 4).

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[4] Actually the southern halves of Section 26 and all sections in that tier and the entire lower tier of sections in Township 17 South, Range 21 East were outside the subject area.

The Commission also finds that frequently those sales at prices averaging over $10.00 per acre were close to (and often contiguous to) other contemporaneous sales at but a fraction of such prices. For example there were contiguous sales in 1857 at average prices of $15.00 and $3.13; at $10.00 and $4.00; at $12.50 and $1.25; at $12.50 and $2.00. The sale at the largest average per acre price was in Township 15 South, Range 21 East, Section 34, near the northern border of the area. The average per acre price for that 80 acre sale was $31.18. In the same section a 160 acre tract sold for an average consideration of $12.50. But about a mile and a half to the east a 160 acre tract sold for an average per acre consideration of $2.50. And about 3 miles to the east another quarter section brought an average per acre price of $2.75. About 3 miles to the southeast a quarter section sold for an average of $4.00 per acre while a quarter section about 3 miles to the southwest sold for a consideration averaging $1.88.

The Commission has little doubt that the sales for relatively large average per acre prices included improvements by the settlers who had been in the area for some time prior to the 1857 public sales.

39. The Commission has also observed that there are relatively fewer resales in the 1857 analysis which were located in the less favorable eastern portions. For example in Township 17 South, Range 24 East, there were only five sales, at prices averaging $2.25, $2.36, $2.50, $2.81 and $3.00 per acre. There were, however, some Indian selections taken out of the northern portion of the area. The surveyors' notes on this township were quite brief:

> The land of this township is considerably below the average, a large portion of it is quite broken, filled with Gravel and Limestone Rock, Some very

fine Springs, considerable very fine timber chiefly on Beaver and the South fork of Wea Creeks.
No settlement either by the Whites or Indians.
(Commission's Exhibit No. 5)

Actually the Indians had selected those areas of this township along Beaver and the south fork of Wea Creeks.

40. The Commission finds that the Indian selections were made in the general area lying on both sides of Bull Creek and South and North Wea Creeks (see Commission's Exhibits Nos. 2 and 3). The Indians selected all of the area encompassing the town of Paola.

41. The Commission finds from all of the evidence now of record in this case that the lands sold by defendant in June and July, 1857, would have brought a greater price if they had been sold at public auction without provisions permitting "settlers" to claim tracts at the appraised valuations. The Commission finds that all of the separate parcels involved had fair market values, as of the June-July, 1857, period, which would have averaged $2.50 per acre.

This average per acre figure times the acreage involved ($2.50 × 207,758.85 acres) would have amounted to $519,397.13. The petitioners are entitled to recover $172,726.04, the difference between the fair market value and the $346,671.09 sum realized at the actual sale ($519,397.13 —$346,671.09=$172,726.04).

42. The petitioners are not entitled to any interest on the award.

Arthur V. Watkins
Chief Commissioner

Wm. H. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

The Peoria Tribe of Oklahoma, and Guy Froman on behalf of the Peoria Nation, Fred Ensworth on behalf of the Kaskaskia Nation, Amos Robinson Skye on behalf of the Wea Nation, and Mabel Staton Parker on behalf of the Piankeshaw Nation,

Petitioners,

v.

The United States of America,

Defendant.

} Docket No. 65

Decided: March 17, 1965

Appearances:

Jack Joseph and Louis L. Rochmes, Attorneys for Petitioners.

Craig A. Decker with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant.

## OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

On September 12, 1962, we entered our decision in this case with respect to Claim I. Concerning Claim II the Commission, at that time, noted that the record was "practically devoid of any proof concerning the various elements which this Commission and the courts have taken into consideration in evaluating land." 11 Ind. Cl.

Comm. 171, 179. The record was reopened, and petitioners introduced some additional evidence. The Commission has, by order dated February 5, 1965, further supplemented the record with certain additional evidence as therein described. We now have the matter of Claim II before us for decision.

The cause of action designated as Claim II involves petitioners' allegation that defendant failed to comply with the provisions of Article 4 of the Treaty of May 30, 1854, requiring that petitioners' land be sold by the United States on a freely competitive market, with the proceeds to be paid to the Indians. Rather, petitioners allege, the defendant permitted non-Indian citizens to trespass upon the land and to purchase the land at artificially low appraised values, far below market price.

The lands involved were owned by petitioners, having been granted to them under previous treaties in 1832. By the terms of the 1854 Treaty the lands were ceded to the United States with provisions for certain reservations and selections to be made therefrom. The remaining lands were to be sold by the United States at public auction and, in consideration for the cession, the net proceeds were to be paid to the petitioners. It was also provided in Article 8, that citizens of the United States or other persons not members of the petitioner tribe should not be permitted to make locations or settlements in the ceded area until after the selections had been made by the Indians.

On the same day that the Peoria treaty was executed the territories of Kansas and Nebraska were organized, and one month later the provisions of the pre-emption law were extended to lands in Kansas and Nebraska to which the Indian title had been extinguished. White settlers, investors, and speculators began to enter the ceded

lands. They located on lands in the area believing, it appears, that they were entitled to pre-emption rights, the lands having been ceded to the United States. However, while there is much evidence concerning the entry of whites upon the subject lands, there is no evidence that they interfered with the Indian selections.

In the months following there was, it appears, increasing turmoil. The white settlers were desirous of obtaining lands at the lowest possible price. There arose a real controversy concerning the application of the pre-emption law provisions to the area in question. On August 14, 1854, the Attorney General of the United States had published an opinion that to grant pre-emption rights to the subject lands, which were by terms of the treaty to be sold at public auction for the account and benefit of the Indians, "would be a violation of the treaties, a breach of trust, a fraud upon the Indians." (Pet. Ex. 166J 1, p. 26).

However, the settlers remained, and others continued to enter the area. The white men were determined to claim the lands upon which they had "squatted." It appears obvious that only concerted military action by the United States could have dissuaded the pioneering settlers and land speculators. In many instances, entire families were living on the lands. Some were from distant eastern states. Forcible removal would have often times endangered lives of women and children. In any event the United States made no persistent or meaningful effort to remove the whites from the ceded lands.

By Act of March 3, 1855, Congress appropriated money and provided for the public sale of the "Peoria lands." It was provided that the tract should first be classified and appraised. Appraisal commissioners were appointed in April, 1856, and their instructions are set forth in our finding of fact number 23. The appraisal

inspections were made in June, 1856. The United States Indian Agent filed objections to the manner in which the inspections were made. The Commission believes that to some extent, at least, the objections were valid. We note for example that the public surveys in a number of the townships had not been made when the June appraisal inspections were conducted. The commissioners themselves reported that the survey plats were not available to them when the land was inspected and, in fact, they were forced to suspend their duties until the survey plats were available. But, as the commissioners stated, ". . . a fair and open competition in the sale of those lands, will best secure to the Indians their just value, and as we believe, the only means of carrying out in good faith the trust those Indians have confided to the Government." (Pet. Ex. 122, p. 3). The appraisals were finally submitted. However, noting the results of the public sales of the nearby Delaware lands (eastern portion), the President found the Peoria appraisals unsatisfactory, and the commissioners were directed to review and increase their appraisal rates. The rates were adjusted by adding twenty-five cents per acre to all of the lands appraised.

As the time for the public sales approached, the United States officials were aware of the many settlers who had already entered the area, and a number had been living with their families and farming quarter sections upon which they had squatted. Land speculators were in the area. There was a tense atmosphere, and the possible necessity for military intervention at the sales was even anticipated.

The instructions to the special commissioner to superintend the sale, as set forth in our finding of fact number 25, provided that "*bona fide* settlers who have made

lasting and valuable improvements on the lands and who resided therein" should be permitted to claim such lands at the appraised price which would "be considered the fair value of the land." Although prior to the sales objections were made to the proposed procedures by both Indian Agent McCaslin and by the Chiefs and Headmen of the Confederated Kaskaskias, Peorias, Piankeshaws, and Weas, the sales were so conducted, and it appears that a substantial number of the tracts were not subjected to public bidding but rather were sold to "settlers" at the appraised prices.

We have referred to the difficult circumstances which had arisen prior to the sales. Undoubtedly, to have forcibly removed the white settlers or to have allowed land speculators or others to bid on settled lands, thereby possibly depriving settlers' families of the fruits of their labors, would have turned the public sales into chaos. At the same time the presence of the whites had stimulated a great interest in the sales and undoubtedly assured the rapid disposition of the lands at the prices obtained.

But we are not really concerned here with a detailed examination of the motives behind the action taken or in an attempt to balance the equities. The fact is that circumstances conspired to prevent the Indians from receiving that which had been promised them under the 1854 Treaty—that is that the lands would be sold at public auction and the Indians would receive the net proceeds of such sale. The evidence is complete and virtually uncontradicted on this issue. We are satisfied that not only were bona fide settlers allowed to claim lands at the appraised prices but land speculators were permitted to circumvent the bidding procedure and qualify as "settlers" by building "pole shanties" or mere foundations.

By the express terms of the 1854 Treaty the defendant assumed a fiduciary capacity with respect to the petitioner tribe in the sale of the subject lands. By its actions in not causing all the lands to be offered for sale at public auction but rather permitting "settlers" to purchase much of the land at the appraised prices the defendant breached its duty to the petitioners.

Accordingly, petitioners are entitled to recover from defendant the difference in the prices paid for the lands sold in 1857 and the fair market value which could have been obtained if each of the parcels had been sold at public auction.

We turn now to the issue of the fair market value of the subject lands. Upon this issue depends the measure of the damages, if any, suffered by petitioners.

However, before discussing this issue, we feel constrained, although reluctantly so, to refer to another matter—namely the state of the record presented in this case on the question of value. While we find the record well assembled and complete on the question of the defendant's alleged "breach of trust," we find a serious deficiency respecting the valuation issue. As previously mentioned, we referred to this problem in our opinion of September 12, 1962, and notified the parties that we would not make findings of fact on petitioners' Claim II until additional evidence on the fair market value of the land had been presented.

In response petitioners introduced into evidence a detailed listing of all the first resales of the lands involved. Defendant has not introduced any evidence on any issue involved in Claim II. We have therefore been faced with the problem of attempting to determine value on the basis of the resale listing presented by peti-

tioners.[1] There was not even a map of the subject area in evidence in the case. The resales, particularly the 1857 resales of the same lands in question are of course of great importance to the issue of value. However, a mere statistical compilation is of little value unless material is furnished to enable the Commission to fairly analyze it and determine the weight to be accorded such evidence. For this purpose we have plotted the 1857 resales on a detailed map of the area; we have determined where the Indian selections were made; we have obtained the surveyors' general descriptions of the townships involved; we have examined the surveyors' detailed notes within those townships; and we have examined evidence concerning the nature of the land involved within the boundaries of the subject tract. Consideration of all of this material was necessary before we could properly weigh the resale evidence and determine the issue of value. Without further belaboring this point we will state simply that the Commission expects that all parties will diligently attempt to present a record in the cases before us which will fairly reflect all the evidence reasonably available which bears on all the issues involved. We do not expect that we will be placed in the position of detailing in each instance that which is required of the parties or of preparing our own record to dispose of these cases.

The public sale of the Peoria lands was conducted during the period from June 24, 1857 to July 13, 1857. That period then covers the dates upon which we must determine the fair market value of the lands. The tracts were

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[1] There was also some evidence of limited value which had been initially presented by petitioners, such as a general description of the Kansas Territory and a description of Miami County.

generally sold in 160 acre parcels except in a few instances involving fractional quarter sections. The parcels sold are described in petitioners' exhibit number 175, which shows the land classification, appraised valuation, and the price for which each parcel sold. We have determined the fair market value on the basis of the total of each of the separate quarter sections or smaller tracts as indicated in petitioners' exhibit 175.

The lands involved are located in eastern Kansas within the present day counties of Miami and Franklin. The land was well suited for farming. Most of the area is comprised of uplands with a small portion of more desirable bottom land located principally in the southwestern part of the tract along the Marais des Cygnes River valley.

The timbered areas were principally along the creeks and limestone was present is almost every locality. There were no railroads in the area in 1857. Transportation was on overland roads to navigable rivers. The tract was located just 25 miles south of the important Kansas River-Missouri River junction at Kansas City.

The subject tract possessed land which was sought after by the settlers in 1857 period. In June and July of 1857 there was great activity and interest in lands in eastern Kansas.

The resales data presented by petitioners serves to provide the best indication of the market value of the parcels involved. There were in 1857, following the June-July 1857 public sales, some 120 resales within the area. These sales, involving as they did the same identical lands which are to be valued and occurring during a period extending to only about 6 months after the valuation dates involved, serve to provide a sound basis for determining fair market value in this case. Defendant has argued that these sales comprise hindsight evidence

and should be rejected as representing occurrences which, having taken place after the valuation date, could not have been known to a prospective purchaser. We do not agree. Granted the actual dollar consideration paid for the tracts involved in the 1857 resales would not have been "known" at the public sales in June and July, 1857. But the undeniable fact is that virtually every single factor which would have been weighed by a purchaser at a land auction sale in June-July 1857 would have been the same identical factors which were considered by the actual purchasers just a few months later. As petitioners have pointed out the purchasers involved in the 1857 resales were the same purchasers who would, undoubtedly, have been bidders at the public auction sales in June and July. Between the June-July valuation period and the remaining six month resale period there were practically no changes in any of the various factors which affect market value.

Petitioners have argued that the resale data, i.e. the 1857 resale data from July to December, 1857, indicates the best evidence of what prospective purchasers would have paid at a June-July, 1857, public auction. That data as compiled by petitioners shows: (a) in Miami County 10,701.58 acres sold for $36,830.70 or an average price of $3.44 per acre; (b) in Franklin County 3,385 acres sold for $18,066.96 or an average price of $5.34 per acre; (c) overall 14,086.58 acres sold for $54,897.66 or an average price of $3.90 per acre. Therefore, petitioners contend, the lands were worth $3.90 per acre, some 2.318 times the average consideration received at the public sale.

While the 1857 resale data does, we believe, serve to indicate the best evidence of market value, the data must be carefully examined to determine the validity of the conclusions which petitioners urge us to draw. We have examined all of the 1857 resales in detail. In our finding

of fact number 36 we have assembled all of the sales in both counties in ascending order by the average consideration paid. We find that with respect to both the Miami and Franklin County computations, and the combined averages as well, the arithmetic averages are greatly affected by a few sales at relatively large average per acre prices. For example we find that the median average for all of the resales in 1857 was $3.03 while the arithmetic average was $4.01. While we do not consider that the median average is to be prefered in all instances over the arithmetic, it is helpful to test the statistical validity of one average by comparison with another method. The median average has the well recognized advantage of not being as easily affected by extreme values while the arithmetic is greatly affected by extremes. In this case we believe the arithmetic average of the resales is, to an extent, distorted by the few sales at high average consideration figures. We have, for example, eliminated those fourteen transactions which averaged $10.00 per acre or more and we found that the arithmetic average was reduced from $4.01 per acre to $3.11 per acre (a figure quite close to the $3.03 median). It is interesting to note that this elimination would reduce the median average by only three cents, from $3.03 to $3.00.

Examination of the locations of the 1857 resales reveals that of the fourteen resales at average considerations over $10.00, eight were located in one township. That township (Township 17 South, Range 21 East) possessed more bottomland than any other township in the area and was quite generally settled one year prior to the June-July, 1857, valuation period. The village of Stanton was located in that township (although outside the subject tract) and was, in May, 1856, surrounded by settlers. The surveyors' notes in May, 1856, referred to gardens, cornfields, wheat

fields and other evidences of extensive farming operations in that township. We believe that many of the sales within that township reflected higher considerations paid for lands which had been substantially improved. Petitioners are not entitled to recover on the basis of an average per acre computation which was inflated by the improvements on some of the resold tracts.

Petitioners have argued that "in most cases the improvements, where there were improvements, had no value of consequence." (Petitioners' Reply Brief on Supplementary Proposed Findings, p. 8). Petitioners contend that defendant's argument concerning the effect of the improvements is entirely speculative. On the other hand petitioners engage themselves in speculation when they argue that those buyers at the public sale who bought for resale would not have made improvements and that settlers, interested in home and farms, would not have been prompt to resell. Consequently, petitioners argue the resales were more likely to be of the unimproved lands than of the improved lands. We cannot accept this as any basis for disregarding the obvious fact that improvements had been made by settlers in the area and that some of the resales in 1857 involved improved properties.

We note that petitioners have also contended that to the extent that improvements were included, such improvements would have belonged to the Indians and not the white trespassers. We cannot accept such a contention. The lands after the 1854 cession did not belong to the Indians. All their former right, title and interest had been ceded to the United States, and the United States was the owner of the lands when the white settlers entered and made the improvements involved. While the treaty did provide that the lands would be sold by the United States and the net proceeds paid to the Indians, this fact

would not have entitled the Indians to have been further enriched by according them additional compensation for improvements made by the white settlers under the circumstances as we have hereinbefore set forth.

When we have a situation such as existed in this case in which it is known that farmers had made settlements in the area at least a year prior to the valuation date, and a great number of the resales were in the area which had the most settlement, and the 1857 resale data indicates that a few sales averaging $10.00, $15.00 and up to $31.18 were contiguous or closely adjacent to sales at but a fraction of such prices ($1.25 to $4.00 an acre for example), we can safely presume those sales at unusually high prices represented the more improved parcels. Further, we believe that some of the other sales, particularly some of those ranging upwards of $5.00 per acre, to a limited extent reflected improvements. Accordingly, we must weigh this factor in applying the 1857 resale "average" to the fair market value issue to be determined.

We also find from an examination of the locations of the 1857 resales that a greater number occurred to the west of Paola where the better lands were located. As indicated on our Commission Exhibits 1, 2 and 3 the Indians selected the best lands in the central and eastern areas along Big Bull and Wea Creeks. The best available lands for the whites was to the west of Paola, particularly in the broad valley of the Marais des Cynges River. The inclusion of more resales within this better area also has served to accord this area a greater weight in the averaging than it in fact bore to the entire area involved. This is another factor which must be considered in determining the weight to be accorded the 1857 resale averages.

We have also noted that petitioners have complained that the appraisals made in 1856 failed to find special values for the townsite of Paola or for nearby lands. The

fact is that the lands surrounding Paola were selected by the Indians and were not included in the lands appraised and sold at the public sales.

The Commission considers that the 120 resales in the last half of 1857 are sufficiently representative of the entire tract to provide a sound basis for our valuation determination. For the reasons we have given we believe that those fourteen sales at prices averaging ten dollars per acre and over should more properly be eliminated from the averaging computation. Petitioners have correctly omitted those resales in 1857 which were made for nominal considerations since they do not reflect market value. Similarly, those resales at ten dollars and over do not, we believe, reflect market value of the unimproved land. We consider that a more statistically valid average of the 1857 resale data would be about $3.00 per acre. We also consider that this $3.00 per acre figure is affected by lesser improvements on some of the remaining 106 resales and also by the fact that the average is weighted by a greater percentage of sales in the area which possessed the best land.

After considering the entire record in this case, as supplemented by the Commission's exhibits, and for the reasons we have set forth, we have concluded that a fair market value for the parcels which were sold in June and July, 1857, would have averaged $2.50 per acre. Accordingly, petitioners are entitled to recover the difference in that value ($2.50 × 207,758.85 acres = $519,397.13) and the sum originally received for the lands, $346,671.09. That difference amounts to $172,726.04.

Petitioners claim that they are entitled to interest since the 1854 Treaty provided that the President "may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds shall be invested in safe and profitable stocks, the interest to be annually paid

to them, or expended for their benefit and improvement." (Article 7). We find that the petitioners are not entitled to interest on any award in this case. The rule is well established that the United States is immune from the burden of interest, in the absence of a contractual or statutory requirement. The claim presented in this case is not one arising under the Constitution. There is no contract or statutory requirement for the payment of interest in this case.

The case will now proceed to a determination of the gratuitous offsets, if any, allowable against the award to be entered.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner

## INTERLOCUTORY ORDER

Upon the Findings of Fact and Opinion this day filed herein and which are hereby made a part of this order, the Commission concludes as a matter of law that:

The defendant by its failure to sell the Peoria lands (Royce Area 326) at public auction, as required by the provision of the Treaty of May 30, 1854, breached its duty to petitioners,

The petitioners are entitled to recover from defendant the difference in the prices paid for the lands sold and the fair market value which could have been obtained if each of the parcels had been sold at public auction.

The fair market values of all the separate parcels involved would have averaged $2.50 as of the June-July, 1857, period,

The petitioners are entitled to recover $172,726.04, the difference between the fair market value of $519,397.13 and the $346,671.09 sum realized at the actual sale.

It Is Therefore Ordered And Adjudged that petitioners shall have and recover of and from the defendant the sum of $172,726.04, less any allowable gratuitous offsets, to be determined in a later proceeding.

Dated at Washington, D. C., this 17th day of March, 1965.

/s/ Arthur V. Watkins
Chief Commissioner

/s/ Wm. M. Holt
Associate Commissioner

/s/ T. Harold Scott
Associate Commissioner

## FINAL AWARD

On March 17, 1965, the Commission entered an Interlocutory Order wherein it ordered that petitioners shall have and recover of and from the defendant the sum of $172,726.04, less any allowable gratuitous offsets. The defendant, in its amended answer filed on July 7, 1965, alleged that it was entitled to credit for gratuitous offsets in a total amount of $1,075.38. In their reply thereto, filed on July 20, 1965, petitioners stated that the allowable gratuitous offsets should not exceed the sum of $829.14 and petitioners prayed that the sum of $829.14 be allowed as credit against the interlocutory judgment of $172,726.04 and final judgment be entered in the sum of $171,896.90. In its response thereto, filed on August 4, 1965, defendant has stated that it has no objection to the entry of a judgment in the amount of $171,896.90, reserving to the defendant, however, all its rights to appeal from said judgment.

Upon consideration of the foregoing the Commission concludes that defendant is entitled to offset the sum of $829.14 against the $172,726.04 awarded to petitioners, leaving a total net recovery of $171,896.90.

IT IS THEREFORE ORDERED that petitioners shall have and recover of and from the defendant the sum of $171,896.90.

Dated at Washington, D. C., this 4th day of August, 1965.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

IN THE UNITED STATES COURT OF CLAIMS
Appeal No. 8-65

Ind. Cl. Comm. Docket No. 65

11 Ind. Cl. Comm. 171
15 Ind. Cl. Comm. 123, 488

(Decided December 16, 1966)

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, ET AL. v. THE UNITED STATES

*Jack Joseph*, attorney of record, for appellants. *Louis L. Rochmes*, of counsel.

*Craig A. Decker*, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for appellee. *Ralph A. Barney*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges*.

OPINION

COWEN, *Chief Judge*, delivered the opinion of the court:

The Peoria Tribe seeks review of two adverse portions of a decision of the Indian Claims Commission which was generally favorable to the tribe. Two separate issues are involved on the appeal. The first concerns the payment given the Indians in place of certain annuities which they relinquished in 1854. Before that year, the Weas and the Piankeshaws were the beneficiaries of permanent annuities coming to $3,800 per year. By the Treaty of May 30, 1854, 10 Stat. 1082, these groups joined with others to form the single Peoria Tribe (see *The Peoria Tribe of Indians of Oklahoma* v. *United States*, 169 Ct. Cl. 1009 (1965)), and all agreed to give up those annuities (Art. 6). "[I]n consideration of the relinquishments and releases aforesaid", the United States agreed to pay the united tribe a total of $66,000 in six installments from 1854 to 1859, "and also to furnish said tribe with an interpreter and a blacksmith for

five years, and supply the smith shop with iron, steel, and tools, for a like period."[1] The Indian Claims Commission found that the United States actually paid a total of $70,820 in discharge of these obligations, and appellants do not now contest that figure. The Commission then found that the commuted value, as of 1854, of the released annuities (computed at a 5 percent interest rate) would be $76,000. Appellants also agree with this conclusion. But the Commission refused to award the tribe the difference between $76,000 and $70,820, (*i.e.*, $5,180), ruling that the consideration paid was not unconscionable even though it fell short by $5,180 of the true value of the released annuities. Appellants urge that this was error, and that they are entitled to a judgment for the $5,180.

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[1] Article 6 provided: "The said Kaskaskias and Peorias, and the said Piankeshaws and Weas, have now, by virtue of the stipulations of former treaties, permanent annuities amounting in all to three thousand eight hundred dollars per annum, which they hereby relinquished and release, and from the further payment of which they forever absolve the United States; and they also release and discharge the United States from all claims or damages of every kind by reason of the non-fulfilment of former treaty stipulations, or of injuries to or losses of stock or other property by the wrongful acts of citizens of the United States; and in consideration of the relinquishments and releases aforesaid, the United States agree to pay to said united tribe, under the direction of the President, the sum of sixty-six thousand dollars, in six annual instalments, as follows: In the month of October, in each of the years one thousand eight hundred and fifty-four, one thousand eight hundred and fifty-five, and one thousand eight hundred and fifty-six, the sum of thirteen thousand dollars, and in the same month in each of the years one thousand eight hundred and fifty-seven, one thousand eight hundred and fifty-eight, and one thousand eight hundred and fifty-nine, nine thousand dollars, and also to furnish said tribe with an interpreter and a blacksmith for five years, and supply the smith shop with iron, steel, and tools, for a like period."

We agree with the Commission that in the circumstances the payment of $70,820 for annuities worth $76,000 did not represent an unconscionable consideration, or indicate something less than fair and honorable dealings. The amount ultimately paid was 93 percent of the full value. This is a small discrepancy, both in percent and in absolute figures. Moreover, as the Commission pointed out, the consideration, according to the treaty, was to be $66,000 in cash plus the supplying of certain goods and services for 5 years; "it may well have been that the United States anticipated that the materials and services would amount to $10,000.00 thereby requiring the total of $76,000.00 to satisfy the obligations under Article 6." 11 Ind. Cl. Comm. 171, 178 (1962). At the time of the signing of the treaty this would have been a reasonable forecast, and it is proper to assess the worth of the consideration at that date rather than upon the basis of what may actually have occurred during the ensuing 5-year period from 1854 to 1859.

*The Miami Tribe of Oklahoma* v. *United States,* 150 Ct. Cl. 725, 740-42, 281 F. 2d 202, 211-12 (1960), *cert. denied,* 366 U.S. 924 (1961), does not require reversal of the Commission's determination. The court held that the consideration for a commuted annuity must be adequate, but in that instance the United States paid only 78 percent of the value and the difference in monetary terms was the large sum of $118,136.50; in addition, Miami Tribe did not have the factor of promised supplies and services which could reasonably be valued, prospectively, as making up the difference.

*Nez Perce Tribe of Indians* v. *United States,* 176 Ct. Cl. —(July 1966), is distinguishable on comparable grounds. The court's opinion points out the significantly different elements supporting that claim: a minimum discrepancy of 33⅓ percent depriving the claimant of at least $566,045.77, with a consequent probable loss of interest of $200,000, thus raising the minimum discrepancy to about 50 percent—a large figure. The court carefully declared that it was not departing from the rule that, before a

price disparity can be labeled unconscionable, it must be "very gross". In the present case we cannot call the small disparity "gross", let alone "very gross".

The second claim involves another provision of the 1854 treaty. Under Article 4, 10 Stat. 1083, the Federal Government agreed to sell some land owned by the Indians in Kansas at public auction, and "to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same". The Commission held that the United States breached these obligations by allowing white "settlers" to buy the lands at an appraised price, rather than selling the property in a freely competitive market at higher levels. The difference between the appraised values and the fair market value was found to be $172,726.04, and recovery was ordered in that amount.[2] Neither side questions this figure. The appellants urge, however, that the Commission erred in refusing to grant interest on this award from 1857 to the date of payment.

Appellants concede that the Government, absent its consent, has always been immune from an obligation to pay interest. "The right to claim and recover interest from the United States is purely a matter of grace * * *." *Richmond, F. & P. R.R. Co.* v. *United States*, 95 Ct. Cl. 244, 259 (1942). The recovery of interest must be expressly provided for in a statute, treaty, or contract. Moreover, the consent necessary to waive governmental immunity from interest "must be affirmative, clear-cut, and unambiguous". *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 590 (1947). As the Supreme Court stated in *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947):

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[2] The Commission found the fair market value of the land to have been $2.50 per acre in June-July 1857 (the time of sale). Since 207,758.85 acres were involved, the tribe should have received $519,397.13. The sum it actually received was $346,671.09. The difference is $172,726.04.

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

See also *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *Cherokee Nation* v. *United States*, 270 U.S. 476 (1926).[3]

There is no contention that there was a constitutional taking of appellants' land. However, more than 100 years after the treaty was entered into and on the basis of a statute enacted many years later, the Indian Claims Commission determined that appellants are entitled to $172,726.04, an additional sum that would have been paid for the Indian lands if the Government had not breached its agreement to sell the lands at public auction. As a result of these events, appellants maintain that if the additional proceeds now determined to be due had been realized when the lands were sold, the language of the 1854 treaty would have required the United States to pay interest on the $172,726.04 and, therefore, that they are now entitled to such interest. The claim is based solely on that portion of Article 7 of the 1854 treaty which reads:

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[3] For an example of how strictly such a waiver of immunity has been construed, see *Anglin & Stevenson* v. *United States*, 160 F. 2d 670 (10th Cir. 1947), *cert. denied*, 331 U.S. 834, (1947), in which Rule 25 of the Circuit Court, in conformity with the related statute and having the force of law, provided that when a lower court judgment is affirmed "interest thereon shall be calculated and levied from the date of the judgment * * *." *Id* at 672. The court held that this allowance of interest did not apply to a judgment against the United States, since Congress had not *expressly* consented to the payment of interest by the United States. *Cf. Nez Perce Tribe of Indians* v. *United States, supra*, slip op. pp. 12-13.

> And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President *may*, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement. [Emphasis added.]

Whether we consider the foregoing language of the treaty separately and apart from the remainder of that document or whether we construe it in connection with other articles of the treaty, we arrive inescapably at the same conclusion: Article 7 of the treaty conferred discretion upon the President to invest the proceeds or not, as he saw fit. There is neither agreement nor consent by the United States to pay interest upon the proceeds.

The word "may" in Article 7 denotes that the signatories to the treaty vested in the President the discretion to pursue alternative courses of action. He could pay the proceeds directly to the Indians; he could *invest* them in "safe and profitable stocks"; or he could do both. There is no mandate that the President act in a single specified manner, and nowhere in the entire treaty may there be found an explicit promise by the Government to pay interest.[4]

When we turn to other provisions of the same treaty, it is apparent that the framers of the treaty knew how to impose a duty or to express a promise, and for such purposes they used clear and explicit language such as "shall"[5] and "agree".[6] The framers also knew how to confer discretion; and when particular powers or actions called for diseretion, the treaty spoke in terms of "may".[7]

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[4] Such a promise cannot, of course, be implied. *United States* v. *N.Y. Rayon Importing Co., supra.*

[5] See, *e.g.*, Articles 3, 4, and 5.

[6] See Article 6.

[7] See, *e.g.*, Articles 3, 4, 9, and 11.

Thus the parties to the treaty knew how to express an "affirmative, clear-cut" obligation. *United States* v. *Thayer-West Point Hotel Co., supra.* They did not do so in Article 7 concerning disposition of the proceeds.[8]

In pressing their claim for interest, appellants rely mainly upon the decision of the Supreme Court in *United States* v. *Blackfeather,* 155 U.S. 180 (1894). However, an examination of that decision demonstrates quite clearly that the treaty there considered contained a direct and unequivocal promise by the United States to pay five percent per annum on the proceeds of the sale of Indian lands. In the seventh article of the treaty before the Supreme Court in that case, it was agreed that the proceeds of the sale of Indian lands, after certain deductions had been made, "shall constitute a fund for the future necessities of said tribe, parties to this compact, *on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity*". [Emphasis supplied.] 155 U.S. at 188. Although the promise of the United States to pay five percent annually on the fund was denominated in the treaty as an annuity, the Supreme Court held that the unqualified promise of the United States to pay an annuity of five percent was substantially the same as an agreement to pay interest in the same amount. That decision cannot be made to fit the case at bar, because in the treaty involved here there was no equivalent affirmative obligation to pay the Indians interest or to make any other type of payment on the

[8] Therefore, we do not consider appellants' argument that Congress in the years immediately preceding the signing of the treaty construed a *promise* to invest in safe and profitable stocks as equivalent to a promise by the United States to pay interest on the sum to be "invested". Our concern here is solely with what the United States obligated itself to do; and as shown above, the United States did not even obligate itself to invest the proceeds. To invest or not was discretionary; hence, even if we were to find the claimed equivalency, we could find no *promise* to pay interest.

proceeds of the sale of their lands, no matter how such payment may be denominated.

*Mille Lac Band of Chippewas* v. *United States*, 47 Ct. Cl. 415 (1912), *rev'd*, 229 U.S. 498 (1913), which is also relied upon by appellants, is equally inapplicable, because that case arose under the Act of January 14, 1889, 25 Stat. 642, which expressly provided for the payment of interest at the rate of five percent per annum on sums received from the sale of the Indian lands. 47 Ct. Cl. at 462.

In summary, the 1854 treaty clearly specified that the disposition of the proceeds of the land sales was left to the discretion of the President. Therefore, it would be judicial treaty-writing for us to read into that agreement an express promise by the Government to pay interest.[9]

For the reasons stated above, we hold that appellants are not entitled to prevail on either of the issues raised in this appeal, and we therefore affirm the determinations of the Indian Claims Commission.

*Affirmed.*

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DAVIS, *Judge*, concurring in part and dissenting in part:

I join in the court's opinion on the first claim, but dissent from the disposition of the demand for interest on the $172,762.04 awarded by the Indian Claims Commission.

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[9] Admittedly no interest is allowable for the breach of an obligation to pay over money to the Indians. *Confederated Salish and Kootenai Tribes* v. *United States*, 175 Ct. Cl. ——(May 1966), *cert. denied*, 385 U.S. 921 and *Ramsey* v. *United States*, 121 Ct. Cl. 426, 431-32, 101 F. Supp. 353 (1951), *cert. denied*, 343 U.S. 977 (1952). Any argument that the President was implicitly precluded from paying over more than was necessary to maintain the reasonable wants of the Indians is without merit. If such a limitation had been desired, it would have been expressly so provided in the treaty. *Cf.* Treaty with the Delawares, May 6, 1854, Art. 7, 10 Stat. 1048, 1050.

The sole ground for this claim is Article 7 of the 1854 Treaty, 10 Stat. 1084, which provided:

> And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

It is agreed that if this is read as containing an express provision for interest appellants can recover, otherwise not. See *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48, 49 (1951); *Confederated Salish and Kootenai Tribes* v. *United States,* 175 Ct. Cl.——, —— (May 13, 1966), *cert. denied,* Oct. 24, 1966. It is also settled that the mere fact that the United States did not pay the additional $172,000 in the 1850's, as it should have, would not, in itself, bar the Tribe from now collecting interest to which it would otherwise be entitled. See *United States* v. *Blackfeather,* 155 U.S. 180, 192 (1894); *Mille Lac Band of Chippewa* v. *United States,* 51 Ct. Cl. 400, 407-08 (1916); *Pawnee Tribe* v. *United States,* 56 Ct. Cl. 1, 15 (1920); *Menominee Tribe* v. *United States,* 107 Ct. Cl. 23, 33, 67 F. Supp. 972, 975 (1946); *Nez Perce Tribe* v. *United State,* 175 Ct. Cl.——, —— (July 15, 1966). These decision show that, if the treaty had said in precise terms that the sums received from the sales should be deposited in the treasury at interest, there would be no question that appellant's position was correct. The issue for us is whether the actual words of the agreement gave the Peoria Tribe the same right to interest.

In resolving this question, we must remember that Indian treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand

them." *United States* v. *Shoshone Tribe,* 304 U.S. 111, 116 (1938). "[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' *Tulee* v. *Washington,* 315 U.S. 681, 684-85."*Choctaw Nation* v. *United States,* 318 U.S. 423, 432 (1943).[1]

The 1854 treaty contemplated that the proceeds of the land sales would either be paid to the Indians, from time to time, or be invested by the Government so as to bear fruit.[2] There are two problems with the phrasing. The first is that the directive to invest referred to "safe and profitable *stocks*", with the *interest*" to be paid over to or expended for the Tribe (emphasis added). To borrow the language of the Supreme Court in the *Blackfeather* case, *Supra,* 155 U.S. at 172, "while this is not literally an agreement to pay interest, it has substantially that effect". In *Blackfeather* the provision was in the form of an annuity measured by five percent on the Indians' money, but the Court looked through this shell to see that the treaty-parties intended the Indians to receive the normal proceeds from their funds. Here the treaty refers to "stocks" and "interest" from those stocks, but it seems clear that the signatories likewise desired the Indians to receive the increment normally earned (if they were not to have the money in their own hands). For some years before this

[1] The Supreme Court has often indicated that, where possible, such treaties are to be interpreted liberally in favor of the Indians. See *The Kansas Indians,* 5 Wall. (72 U.S.) 737, 760 (1866); *Choctaw Nation* v. *United States,* 119 U.S. 1, 27—28 (1886); *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899); *Minnesota* v. *Hitchcock,* 185 U.S. 373, 396 (1902); *United States* v. *Winans,* 198 U.S. 371, 380—81 (1905).

[2] It would be wholly inadmissible, in my view, to read the treaty as permitting the President simply to retain the money in the treasury without interest, instead of turning it over to the Indians or investing it. The court does not suggest that the President had this do-nothing option, which undoubtedly would have contravened the Indians' understanding.

1854 treaty, the Federal Government construed similar agreements calling for investment in "safe and profitable stocks" yielding "interest" of not less than five per cent as being satisfied by an appropriation, from year to year, of a sum equal to five per cent interest. See Annual Report of the Commissioner of Indian Affairs, Nov. 30, 1852, p. 10 (H. Doc. 1, pp. 300-01); Annual Report of the Commissioner of Indian Affairs, 1853, pp. 10-12 (H. Doc. 1, p. 263).[3] The only change in the 1854 treaty was the deletion of the specific reference to five per cent; the reason for this change seems to have been the wish to assure the Indians the possibility of a greater amount obtainable from private investments, not to cut off the Indians' right to the fair proceeds of their moneys which were retained by the Government and not handed over to them. *Ibid.* That right was preserved.

The other problem—the one with which the court's opinion treats—arises from the possibility that the President might have immediately turned over the whole $172,000 to the Indians, if it had been paid in 1857, without retaining any for investment.[4] This is, of course, a theoretical possibility, but it seems very unlikely as a practical matter. The President would not hand over to these dependent Indians more than they needed or could properly use for day-to-day expenses; nor could the Tribe expect to receive more than this. The comparable article of a con-

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[3] In recommending that such appropriations no longer be made, but that the principal be invested, the Commissioner of Indian Affairs said that the prior practice had "failed to execute" the treaty stipulations, but it is clear to me from the context that he was complaining of the costly drain on the treasury of the practice of continually appropriating the interest without any money coming into the treasury through investment of the principal, and that he well understood the past practice to be in substitution for the payment of the proceeds of investment. He thought, too, that the Indians would be advantaged by investing the money.

[4] See footnate 2, *supra.*

temporaneous treaty with the Delawares, 10 Stat. 1048, 1050 (1854), says expressly that the amounts to be paid over were to meet "current wants" and "reasonable wants",[5] and the Peoria Treaty would probably be interpreted in the same way. Thus, the President's discretion was not large, but was to be exercised in consultation with the Indians and according to the standard of their need. On that basis, it is most unlikely that the large sum of $172,000 would have been paid over rather than invested. Only a minimum of speculation is needed, in my opinion, to find that the money would have borne fruit if the United States had accounted for it in the 1850's.

The Treaty's use of "may", rather than "shall", should not be given the weight the court puts on it to show the unlimited character of the President's discretion. This was not a carefully-drawn business contract between equals or even a Congressional enactment, but an Indian treaty. "[F]riendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed." *United States* v. *Shoshone Tribe, supra,* 304 U.S. at 116. "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan, supra,* 175 U.S. at 11. To the Peoria Tribe, Article 7 would have meant the same if it had said that the President "shall", instead of "may",

[5] Article 7 of the Delaware treaty provided: "it is expected that the amount of moneys arising from the sales herein provided for, will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary."

determine the way the funds were to be allocated. Their understanding, as I judge it, was that the monies turned over to them would be enough to satisfy their current wants, and the rest was to be invested for profit, with the increment accruing to their benefit. That was "the substance of the right without regard to technical rules." *United States* v. *Winans, supra,* 198 U.S. at 381.

The Supreme Court's decision in *Blackfeather, supra,* 155 U.S. at 188, 192-93, supports, I think, this practical and non-technical reading of the appellants' treaty. In that case the agreement calling for a five percent "annuity" on a fund composed of proceeds of Indian land sales provided further that the fund was to continue "during the pleasure of Congress, unless the chiefs of the said tribes or band, by and with the consent of their pepole, in general council assembled, should desire that the fund thus to be created, should be dissolved and paid over to them; in which case the President shall cause the same to be so paid, if in his discretion, he shall believe the happiness and prosperity of said tribe would be promoted thereby." Under this stipulation the fund was dissolved and paid over in 1852. But when the Supreme Court agreed in 1894 with this court that judgment should be entered against the United States for certain sums not credited the Indians at the time of the sale (in 1840), the Court ruled that interest on that amount should be paid, not only until 1852, but until the judgment was paid (sometime after 1894). "If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity continues until the money is paid over." 155 U.S. at 193. This, I take it, was a refusal to hold that the Indians were barred from collecting interest from 1852 to 1894 because they could not prove that the omitted sum would not have been distributed in 1852 along with the other monies. Similarly, in the present case, the appellant Tribe, which did not in fact receive the $172,000 in the 1850's, should not be precluded

from obtaining interest because it cannot prove conclusively that the sum would have been invested, rather than paid over at once, if the United States had sold the lands at public auction as it should have.

To construe the 1854 Treaty as providing for interest would not conflict with any decision of this court. In *Confederated Salish and Kootenai Tribes* v. *United States, supra,* 175 Ct. Cl ——, —— (May 13, 1966), *cert. denied,* Oct. 24, 1966, the opinion assumed that a statute requiring deposit in the treasury of "all sums received on account of sales of Indian trust lands", and declaring that interest was to be paid on these deposits, would have applied to monies improperly withheld from the Indians, if it were not for a later act partially modifying the earlier legislation. In *Nez Perce Tribe* v. *United States, supra,* 176 Ct. Cl. ——, —— (July 15, 1966), the partciular treaty specified a precise sum to bear interest ($1,000,000), and "did not make the trust open-ended. * * * The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon [*i.e.,* $1,626,222] and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest." The present treaty, in contrast, is open-ended in its terms; it covers, not a specified sum, but all the net proceeds and receipts from the sales. The $172,000 represents a major part of the proceeds which should have been set apart for the Tribe and invested.[5]

DURFEE, *Judge,* joins in the foregoing opinion concurring in part and dissenting in part.

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[5] It is irrelevant that an award of interest, pursuant to the 1854 treaty, could increase the award to plaintiff by five or six times. If the treaty so provides, we cannot refuse interest because the amount is relatively large.

## MOTION FOR REHEARING

Appellants move for rehearing and reconsideration of the decision of December 16, 1966 herein with respect to "Claim II".

Appellants state that the basis of the Court's construction of Article 7 of the Treaty of May 30, 1854, 10 Stat. 1082, denying appellants' claim for interest (namely, the analysis of the word "may" as permissive rather than mandatory) was not argued by the parties. Appellants request that they be given an opportunity to demonstrate that the Court's conclusion is erroneous in that:

(1) *Under the case law,* the word "may" in Article 7 imposed an obligation upon the President to invest that which he did not pay over to the Indians from the proceeds of the sale of the trust lands, and

(2) *The evidence in the record* (not brought to the attention of the Court because the specific point was not argued) shows that the President in fact made a determination as to what should be paid over to the Indians and a determination that the balance should be invested in safe and profitable stocks, so that under the treaty he was required ("how much *shall* be invested . . .") to invest these funds for the benefit of the Indians.

Appellants attach a memorandum in support of their petition.

Appellants pray that the Court rehear and reconsider this appeal, and upon such rehearing and reconsideration, reverse the determination of the Indian Claims Commission and remand this cause of the entry of a judgment increased by an appropriate award of interest.

JACK JOSEPH
Attorney of Record, The
Peoria Tribe of Indians of Oklahoma,
Appellants

LOUIS L. ROCHMES,
Of Counsel.

## MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING

### I. INTRODUCTION.

On December 16, 1966, the Court's majority rejected appellants "Claim II", seeking interest on appellants' recovery of $172,762.04. The principal recovery, from which the defendant has not appealed, was based on the breach by the defendant of the fiduciary duties which it assumed under the Treaty of May 30, 1854, 10 Stat. 1082. The defendant had agreed to sell appellants' land in trust and to turn over the proceeds to the Indians. Since the defendant did not sell the land at a free auction as promised, but rather disposed of the land to favored settlers at less-than-market value, the Commission awarded the judgment.

Whether or not appeallants are entitled to interest depends upon Article 7 of the 1854 treaty:

> And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit or improvement.

As appellants understand the gist of the majority opinion, it is that, by reason of the use of the word "may" (". . . the President may, from time to time, determine . . ."), the treaty provision was discretionary rather than mandatory and imposed no obligation on the defendant to invest the proceeds, so that even if a duty to invest be equivalent to a covenant to pay interest, the appellants are not entitled to recover.

Appellants would first like to show that the Court is in error in supposing that the word "may" in this context is discretionary, and secondly, to show that *even if it is discretionary,* the President exercised his discretion and the treaty therefore made it mandatory for defendant to invest.

## II. THE WORD "MAY" IN ARTICLE 7 IMPOSED AN OBLIGATION ON THE PRESIDENT.

In denying appellants' appeal, the Court did so on a basis not specifically argued by the parties, but rather on its own conclusion that the word "may" denotes a discretionary power, rather than a mandatory duty upon the President. Appellants respectfully suggest that a review of the case law indicates that the word "may" in this treaty imposed an obligation upon the President to exercise his discretion in favor of investing the monies in question so that the Indians might obtain the interest thereon.

Before discussing the cases, appellants note the following:

(1) The discretion in question was not an unlimited one, but was, as the Court recognizes, a choice which the President had between three limited alternatives. As the Court put it [slip opinion, page 5], "He could pay the proceeds directly to the Indians; he could *invest* them in 'safe and profitable stocks'; or he could do both."

(2) The case law holds that where a public official is empowered to do something with respect to third parties for the benefit of third parties, the word "may" is treated as conferring a mandatory obligation.

(3) Even if this case is deemed not to fall under the foregoing rule, the meaning of "may" is ambiguous, and in the case of ambiguity, the rules of construction require that the treaty be interpreted in favor of appellants.

A. The doctrine that "may" is to be construed as conferring a mandatory duty upon a public official.

This rule is succinctly expressed by the United States Supreme Court in the case of *Mason* v. *Fearson,* 9 How. (U.S.) 248, 259:

> Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds that he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty".

Article 11 of the 1854 treaty explicitly notes that, "The object of this instrument [is] to advance the interests of said Indians . . ." and it is clear that the power in Article 7 is conferred upon the President for the *benefit* of the appellants, thus bringing this case squarely under the rule that "may" implies an obligation when it vests power in a public official for the benefit of others. (An Indian treaty is equivalent to the act of the legislative body: *United States* v. *43 Gallons of Whisky,* 93 U.S. 188, 196, citing *Firks & Elam* v. *Neilson,* 2 Pet. 314.)

In addition to *Mason* v. *Fearson* and the many cases therein cited, to the same effect, see *United States* v. *Caplinger,* 18 F. 2d 898 (CCA 8); *Supervisors* v. *United States,* 4 Wall. 435, 18 L. Ed. 419 [wherein the words "may, if

deemed advisable" were, under this doctrine, held to require public officers to act]; *Wilson* v. *United States,* 135 F. 2d 1005 (CCA 3) [reviewing many cases on the subject]; *City of Galena* v. *Amy,* 72 U.S. 705 [wherein "may, if said city council believe that the public good and the best interests of the city require" was held to be so mandatory thaat a writ of mandamus would issue to compel action]; *Chase* v. *United States,* 261 Fed. 833, 837, affirmed, 256 U.S. 1 and many others. This is the rule in the state courts as well as in the Federal System. E.g., see *Harless* v. *Carter,* 42 Cal. 2d 352, 267 Pac. 2d 4.

B. Even if this case does not fall within the rule of Mason v. Fearson, the word "may" is ambiguous, and all the rules of construtcion require that it be construed in appellants' favor.

In its decision of December 16, 1966, the Court holds that the word "may" indicates discretion. The authorities, however, are to the effect that the word is, at best, ambiguous. As was said in *Greyhound Corp.* v. *Excess Insurance Co. of America,* 233 F. 2d 630, 634 (CA 5):

> The word "may," when used as an auxiliary verb, is susceptible of several meanings. It comprehends mere possibility, but includes also the thought of probability, and in its scope is the idea of expectancy of a reasonable certainty.

As Judge Jerome Frank stated in *United States* v. *Lennox Metal Mfg. Co.,* 225 F. 2d 302 (CA 2) in rejecting the government's contention that "may" in a government contract conferred discretion, ". . . the word 'may' has often been construed as 'shall'" [at p. 309]. (This is as true of the state decisions as it is of the Federal courts; e.g., see *Carleno Coal Sales, Inc.* v. *Ramsay Coal Co.,* 270 P. 2d 755 [Colo.]). The very number of cases wherein the courts

have been called upon to decide the meaning of the word "may" in themselves show that the word it not free from ambiguity.

Once it is understood that Article 7 admits of the possibility of implying an obligation upon the President to invest that which was not paid over, the courts look to the rules of construction to determine the intent of the parties. Each and every one of these rules favors the construction that the President was required to invest:

As is said in 17 Am Jur 2d 643 (Contracts §250), ". . . it is widely held that where the language of a promisor may be understood in more senses than one, it is to be construed in the sense in which he had reason to suppose that it was understood by the promisee." Or as it is put at 17 Am Jur 2d 688 (Contracts, §275):

> It is often said that, if other things are equal, an interpretation most beneficial to the promisee will be adopted when the terms of an instrument and the relationship of the parties leave it doubtful whether words are used in an enlarged or restricted sense. Conversely it is said that everything is to be taken most strongly against the party on whom the obligation of the contract rests, or that contracts are to be construed in favor of the promisee and against the promisor. * * *
>
> It is also said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist.

In the case at bar, the defendant is both the promisee and the party who drafted the instrument.

In the following section (17 Am Jur 2d 689, Contracts §276), it is stated that:

> It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected the language * * *

and

> Also, in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it • • •

which in the case at bar is the defendant.

In this connection, the authorities cited in the dissenting opinion as to the rule of construction of Indian treaties is also material, for in addition to the usual presumptions, the construction is to be "in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people."

## III. IN ANY EVENT, THE PRESIDENT ACTUALLY MADE A DETERMINATION, AND EVEN UNDER THE COURT'S CONSTRUCTION, THE TREATY IMPOSES AN OBLIGATION.

Assuming that the President had the discretion to determine whether he should pay or invest, Article 7 nevertheless requires him to act once he had made his decision. Article 7 says that the President may determine from time to time, upon consultation with the Indians,

> how much of the net proceeds of the sales *shall be paid* to them, and how much *shall* be invested in safe and profitable stocks. [Emphasis added.]

If "may" in the first clause is construed as discretionary, then the "shall" in the second clause is certainly language of obligation in the second. It would appear to follow from the Court's reasoning that *if the President made a determination,* then he was *required* by the remainder of the clause to carry it out.

Because the view taken in the Court's opinion had not been argued by the defendant, appellant did not point out the evidence in the record which demonstrates that the

President did in fact make a decision. *The President decided that not all of the money should be paid over to the Indians, but rather that some should be paid and that the balance should be invested, and the interest was paid on that which actually was invested.** Defendant's exhibits 1-13 are accountings prepared by the General Accounting Office. In the specific accounting for this case (Docket 65 before the Indian Claims Commission), Section F, particularly at pp. 69 and following [excerpts from which are attached to this motion as an appendix], defendant itself shows that the President determined that the Indians' present needs required him to pay over only $59,641.45 of the $398,133.58 available from the proceeds of sale and that he determined to invest the balance (then consisting of $337,704.85, plus a few minor items) in state bonds.

Further, the accounting shows that this money was kept in bonds until an Act of Congress, 21 Stat. 70, April 1, 1880, allowed the Secretary of the Interior to deposit the principal in the Treasury, "and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, and each may become due, without further appropriation by Congress." *In other words, the government was at that time, and at the later times set forth in various other statutes quoted in the report, treating the obligation of Article 7 with these Indians as an obligation to pay interest.**

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* Defendant's counsel did make mention of this fact in his oral argument, but only in passing and in connection with another point.

* As the Court notes in Footnote 8, page 6 of the slip opinion, it did not reach the question as to whether a covenant to invest is equivalent to a covenant to pay interest

With the fact of the President's determination before the Court, and the determination that only a very small part of the proceeds was necessary for the present needs of the Indians, and that the rest should be invested, it is submitted that the Court has new material before it for consideration, not previously called to its attention, which new material constitutes urgent and compelling reason for revision of the decision.

## CONCLUSION

Appellants respectfully pray that the court rehear and reconsider its decision of December 16, 1966, and that upon such rehearing and reconsideration, that the Court reverse the decision of the Commission denying appellants' interest, and remand the case for the purpose of increasing the judgment to include an award of the appropriate interest.

Respectfully submitted,

JACK JOSEPH
*Attorney of Record for the Peoria Tribe of Indians of Oklahoma, Appellants.*

LOUIS L. ROCHMES
*Of Counsel.*

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* (Continued)
because it found that "[to] invest or not was discretionary . . ." It should be pointed out, however, that the authorities also clearly hold that the damages recoverable against one who breaches his duty to invest is measured by that "which he should have received," or the legal rate of interest. See Restatement of the Law 2nd, Trust §207 (pp. 468-471) and the numerous cases cited in the Appendix to that section (Appendix volume, pp. 359 et seq.). See also II, Scott on Trusts 1534 (§207.1).

## APPENDIX

Excerpts from Defendant's Exhibits 1-13: "General Accounting Office Report Re: Petition Of The Peoria Tribe Of Oklahoma Indian Claims Commission No. 65" Section F, which "contains information relative to disbursements for the Confederated Tribe of Peoria, Kaskaskia, Wea, and Piankeshaw Indians, pursuant to the treaties of May 30, 1854, and February 23, 1867, and" specified statutes relating thereto.

• • •

Article 3 of the 1854 treaty provided that the Indians should select the quantity of land to which they were entitled as specified in article 2; article 4 provided that after the selections were made the residue of the ceded lands were to be sold; and article 7 further provided that the President could, with consent of the Indians, invest the annual receipt from the sales of their land in safe and profitable stocks, the interest to be paid to them, or expended for their benefit and improvement. The records disclose that during the period August 20, 1857, to August 23, 1894, a total of $370,997.97, proceeds arising from the sales of these lands, was set up and carried on the books of the Treasury under the heading "Fulfilling Treaties with Kaskaskias, Peorias, Weas, and Piankeshaws—Proceeds of Land" and was augmented by $27,135.61 (aggregate of items (b), (c), (d), and (e), page 133), making a total of $398,133.58 available for disbursement. The amount of $27,135.61 included $25,343.28 realized from the sale of $25,000, par value, Pennsylvania 5 percent Coupon bonds (included in item (c), page 133), sold pursuant to the act of March 3, 1863, 12 Stat. 774, 792, 793, which reads in pertinent part:

"SEC. 2. *And be it further enacted,* That the Secretary of the Interior be authorized to dispose of, at

> the best price they will bring in the market, twenty-five thousand dollars of the bonds of the State of Pennsylvania, purchased with the proceeds of the sales of the lands of the united bands of the Weas, Peorias, Kaskaskias, and Piankeshaw Indians of Kansas, now in the custody of the United States belonging to said Indians, or so many thereof as he may deem necessary for the purchase of such clothing, food, seed, grain, agricultural implements or domestic animals, as may be necessary for the immediate relief of said Indians, and to enable them to plant a crop, and appropriate the proceeds of the sales of said bonds or so much thereof as he may deem necessary for said purpose * * *."

Of the $398,133.58 so available, $59,641.45 was disbursed for the Confederated Tribe of Peoria, Kaskaskia, Wea, and Piankeshaw Indians, $337,704.85 was invested in bonds, $96.78 was transferred to "Kaskaskia, Peoria, Wea, and Piankeshaw Fund," and $690.50 was reimbursed to the United States (see page 133, items (f), (g), (h), and (i), respectively).

In addition to the purchase of bonds from the proceeds of the sales of their lands, other bonds were purchased from interest on, and the proceeds of the sale and redemption of, bonds held in trust for the Confederated Tribe of Peoria, Kaskaskia, Wea, and Piankeshaw Indians until the passage of the act of April 1, 1880, 21 Stat. 70, which provides in pertinent part:

> "That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales

of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress."

Section 1 of the act of July 12, 1862, 12 Stat. 539, 540, directed the Secretary of the Treasury:

"* * * to cause to be entered upon the proper books of his department the following credits to the Indian tribes herein named, to wit: * * * and to the confederate bands of Kaskaskias, Peorias, Piankeshaws, and Weas, the sum of one hundred and sixty-nine thousand six hundred and eighty-six dollars and seventy-five cents; which said amounts are for and in place of the same amounts heretofore invested by the government under treaty stipulations with said tribes in the bonds of the States of Missouri, Tennessee, and North Carolina, which were stolen while in the custody of Jacob Thompson, late Secretary of the Interior, in whose department they had been deposited for safe-keeping."

The amount of $169,686.75, directed to be entered on the books of the Treasury by this act, represented a like amount of the funds of the Confederated Tribe of Peoria, Kaskaskia, Wea, and Piankeshaw Indians previously invested in State bonds having a par value of $196,000, and consisting of $25,000 Missouri 6 percent bonds, $74,000 North Carolina 6 percent bonds, and $97,000 Tennessee 6 percent bonds, which had been stolen by Godard Bailey in 1860.

Section 2 of the 1862 act authorized and directed the Treasurer of the United States to pay said Indians, on requisition by the Secretary of the Interior, interest on the $169,686.75 at the rate of 5 percent per annum payable semiannually; and consequently there was appropriated $97,966.17 as interest which was credited under "Interest on Kaskaskia, Peoria, Wea, and Piankeshaw Fund" (see item (i), statement No. 17, page 113).

All interest the Confederated Tribe of Peoria, Kaskaskia, Wea, and Piankeshaw Indians had in the stolen bonds was terminated by section 3 of this act and title to the stolen bonds was vested in the United States.

Section 4 of the act appropriated $12,726.50 as interest at 5 percent per annum on the $169,686.75, from the date of the last payment of interest (December 31, 1860), to July 1, 1862 (included in item (i), page 113).

Section 5 of the act provided that the act should take effect and be in force only in relation to such of the tribes interested as should file with the Secretary of the Interior their assent in writing to such portions of the act as related to their respective tribes.

The Confederated Tribe of Peoria, Kaskaskia, Wea, and Piankeshaw Indians consented to the provisions and stipulations of the act as disclosed by the Annual Report of the Commissioner of Indian Affairs for the year 1869, page 486, which reads in pertinent part * * *

## RESPONSE TO MOTION FOR REHEARING
(Filed—Jan 24 1967)

### Statement

The Peoria Indians alleged before the Indian Claims Commission that the United States had sold certain of their lands contrary to the terms of the Treaty of May 30,

1854, 10 Stat. 1082, and prayed for relief. In its decision of March 17, 1965 (15 Ind.Cl.Comm. 123), the Commission held that the United States had breached the treaty conditions in the sale of the land and awarded the Peoria Tribe an interlocutory judgment of $172,726.04 as the difference between what the lands were sold for by the United States and their fair market value. The Commission subsequently allowed the Government to offset $829.14 against this amount reducing the final judgment in favor of the Peorias to $171,896.90 (Order of August 4, 1965, 15 Ind.Cl.Comm. 488).

The Peoria Tribe appealed on the ground that interest should have been allowed on the judgment of $172,726.04. The Court, Judge Davis and Judge Durfee dissenting, affirmed the Commission (slip opinion of December 16, 1966).

The tribe also appealed with respect to a deficit in the commutation of their annuities. However, only the interest question is raised in its motion for rehearing filed January 9, 1967. For the reasons set out below, appellee submits that the motion for rehearing should be denied.

## Argument

Appellants claim that the United States consented to pay interest. They base the claim on Article 7 of the 1854 Treaty which reads in pertinent part as follows:

> * * * And as the amount of the annual receipts from the sales of their lands cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid over to them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

Clearly, on its face, there is no intendment here that the United States would use the proceeds of the sales for itself or itself pay for the use of the money. The role of the United States was to be that of agent, broker, and/or trustee; not borrower of the tribe's money.

Of course, if one indulges in enough assumptions, the agreement could doubtlessly be changed from what it was to some other agreement—even an agreement by which the United States committed itself to pay interest. For example:

*Assume,* firstly, that instead of adopting the term "the President *may* determine" the provision used the term "the President *shall* determine" what proceeds should be paid over and what proceeds should be invested.

*Assume,* secondly, that instead of clearly granting the President three alternatives (i.e., to turn over all the proceeds to the tribe, to invest all the proceeds, or to turn over part and invest part), the provision had unequivocally required the President to invest all the proceeds. And,

*Assume,* thirdly, that a provision for investment of the proceeds, with the user thereof obligated to pay the interest, is the equivalent of a provision that the proceeds shall be "deposited in the Treasury of the United States and the United States shall pay interest thereon from the date of deposit."[1]

Yes, if one were to *rewrite* the treaty provision, one could convert it into an unconditional promise to pay interest. However, the Court refused to rewrite, stating that "it would be judicial treaty-writing for us to read

[1] Cf. Act of April 1, 1880, 21 Stat. 70 (Appellants' Brief, page 2a).

into that agreement an express promise by the Government to pay interest" (slip opinion, p. 7).

In their motion for rehearing, appellants claim the President did not have discretion, seizing upon the fact that the word "may" has on occasion been used in a mandatory sense (Br. 4-6) and contending that in any event its use in the treaty is ambiguous[2] rather than discretionary (Br. 6-8). Appellants ignore the fact that the treaty allowed the President to take alternative action. Reading the word "may" in the context of Article 7 with its express alternatives, there can be little question but that it bore a discretionary meaning. The Court carefully explained this as follows (slip opinion, p. 5):

> Whether we consider the foregoing language of the treaty separately and apart from the remainder of that document or whether we construe it in connection with other articles of the treaty, we arrive inescapably at the same conclusion: Article 7 of the treaty conferred discretion upon the President to invest the proceeds or not, as he saw fit. There is neither agreement nor consent by the United States to pay interest upon the proceeds.
>
> The word "may" in Article 7 denotes that the signatories to the treaty vested in the President the discretion to pursue alternative courses of action. He could pay the proceeds directly to the Indians; he could *invest* them in "safe and profitable stocks"; or he could do both. There is no mandate that the President act in a single specified manner, and nowhere in the entire treaty may there be found an explicit promise by the Government to pay interest. [Footnote omitted.]

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[2] The argument that the treaty provision was ambiguous does not help appellants' claim for interest—the consent must be clear cut and *unambiguous* (slip opinion, page 4, and cases cited).

It seems perfectly clear that the Court's explanation is correct, and that there is absolutely no basis here for construing the treaty as making it mandatory upon the President to invest the proceeds in safe and profitable stocks.

Appellants next assert that the fact the President did in fact pay part of the proceeds to the tribe and invested the rest of the money proves that the President had no discretion in the matter (Br. 8-10). Actually the reverse is true. As the Court points out (slip opinion, p. 5), the subject provision permitted the President (1) to pay all the proceeds to the tribe, (2) to invest all the proceeds, or (3) to pay part to the tribe and invest part. Moreover, within the last alternative the President clearly had discretion to make the mix in any proportions he saw fit. And while one can now, 110 years later, *assume* that *if* the President had held additional proceeds he would have invested *all* the additional money held, one can just as well assume that he would have paid part or all of the additional proceeds over to the tribe. Thus, wide discretion was so clearly provided that the Court did not even need to reach the question of whether the agreement to invest could be construed to be a promise to pay interest (footnote 8, page 6):

> Therefore, we do not consider appellants' argument that Congress in the years immediately preceding the signing of the treaty construed a *promise* to invest in safe and profitable stocks as equivalent to a promise by the United States to pay interest on the sum to be invested".[3] Our concern here is solely with what the

[3] In point of fact the Government did not so construe a promise to invest; on the precise contrary, it unequivocally construed it to mean just what it said—a conditional promise to invest the proceeds in profitable stocks (Pets. Ex. 106, pp. 10-12).

United States obligated itself to do; and as shown above, the United States did not even obligate itself to invest the proceeds. To invest or not was discretionary; hence, even if we were to find the claimed equivalency, we could find no *promise* to pay interest.

Appellants also contend that they are entitled to a liberal construction of the Treaty provision (Br. 7-8).[4] But here again appellants are mistaken. While it is true that liberal construction has been applied to Indian treaties as a general rule, the general rule is not applicable to the present situation. The law is perfectly clear that aside from Fifth Amendment takings no interest can be charged against the United States unless it has expressly consented to pay the interest. Moreover, that consent cannot be implied but must be clear cut, affirmative, unambiguous and is subject to *strict* (not liberal) construction. *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947). And the same rule has been applied, without exception, to Indian cases. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *Loyal Creek Indians* v. *United States*, 118 C.Cls. 373 (1951), cert. den. 342 U.S. 813; *Confederated Salish and Kootenai Tribes* v. *United States* (C.Cls., May 13, 1966), cert. den. 385 U.S. 921; *Nez Perce Tribe* v. *United States* (C.Cls., July 15, 1966). Inescapably, this is the line of cases that controls the issue here; not the authorities cited by appellants.

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[4] However, as we have seen, even liberal construction is not enough—a rewriting is necessary to make the provision into an affirmative promise to pay interest.

Appellee respectfully submits that the Court's holding of December 16, 1966, was eminently correct, and that appelants' motion for rehearing should be denied.

EDWIN L. WEISL, JR.
Assistant Attorney General

Ralph A. Barney
Attorney

Craig A. Decker
Attorney

## MEMORANDUM OF DENIAL OF REHEARING ORDER

These cases come before the court on motions for rehearing and reconsideration and for other relief under Rules 68 and 69 of the Rules of this court and, on consideration thereof.

It Is Ordered this 17th day of March 1967, that said motions be and the same are denied as follows:

475-59 Luria Brothers & Company, Inc. Defendant's motion for rehearing.

App. 8-65 The Peoria Tribe of Indians of Oklahoma, et al. Appellants' motion for rehearing.

By The Court
Wilson Cowen
Chief Judge

## CLAIMANTS' EXHIBIT No. 18

Docket No. 65 et al.

10 Stat. 1082
May 30, 1854
Treaty

FRANKLIN PIERCE,
PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the thirtieth day of May, one thousand and eight hundred and fifty-four, by George W. Manypenny, Commissioner on the part of the United States, and the following named delegates of the united tribes of Kaskaskia and Peoria, Piankeshaw and Wea Indians, viz: Kio-kaw-mo-zan, David Lykins; Sa-wa-ne-ke-ah, or Wilson; Sha-cah-qua, or

Andrew Chick; Ta-co-nah, or Mitchell; Che-swa-wa, or Rogers; and Yellow Beaver, thereto duly authorized by said tribes; which treaty is in the words following, to wit:

*Articles of agreement and convention made and concluded at the City of Washington this thirtieth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, Commissioner on the part of the United States, and the following named delegates representing the united tribes of Kaskaskia and Peoria, Piankeshaw and Wea Indians, viz: Kio-kaw-mo-zan, David Lykins; Sa-wa-ne-ke-ah, or Wilson; Sha-cah-quah, or Andrew Chick; Ta-ko-nah, or Mitchel; Che-swa-wa, or Rogers; and Yellow Beaver, they being duly authorized thereto by the said Indians.*

ARTICLE 1. The tribes of Kaskaskia and Peoria Indians, and of Piankeshaw and Wea Indians, parties to the two treaties made with them respectively by William Clark, Frank J. Allen, and Nathan Kouns, Commissioners on the part of the United States, at Castor Hill, on the twenty-seventh and twenty-ninth days of October, one thousand eight hundred and thirty-two, having recently in joint council assembled, united themselves into a single tribe, and having expressed a desire to recognized and regarded as such, the United States hereby assent to the action of said joint council to this end, and now recognize the delegates who sign and seal this instrument as the authorized representatives of said consolidated tribe.

ARTICLE 2. The said Kaskaskias and Peorias, and the said Piankeshaws and Weas, hereby cede and convey to the United States, all their right, title and interest in and to the tracts of country granted and assigned to them, respectively, by the fourth article of the treaty of October twenty-seventh, and the second article of the treaty of October twenty-ninth, one thousand eight hundred and thirty-two, for a particular description of said tracts,

reference being had to said articles; excepting and reserving therefrom a quantity of land equal to one hundred and sixty acres for each soul in said united tribe, according to a schedule attached to this instrument, and ten sections additional, to be held as the common property of the said tribe,—and also the grant to the American Indian Mission Association, hereinafter specifically set forth.

ARTICLE 3. It is agreed that the United States, shall as soon as it can conveniently be done, cause the lands hereby ceded to be surveyed as the public lands are surveyed; and, that the individuals and heads of families shall, within ninety days after the approval of the surveys, select [1083] the quantity of land therefrom, to which they may be respectively entitled as specified in the second article hereof; and that the selections shall be so made, as to include in each case, as far as possible, the present residences and improvements of each—and where that is not practicable, the selections shall fall on lands in the same neighborhood; and if by reason of absence or otherwise the above mentioned selections shall not all be made before the expiration of said period, the chiefs of the said united tribe shall proceed to select lands for those in default; and shall also, after completing said last named selections, choose the ten sections reserved to the tribe; and said chiefs, in the execution of the duty hereby assigned them, shall select lands lying adjacent to or in the vicinity of those that have been previously chosen by individuals. All selections in this article provided for, shall be made in conformity with the legal subdivisions of the United States lands, and shall be reported immediately in writing, with apt descriptions of the same, to the agent for the tribe. Patents for the lands selected by or for individuals or families may be issued subject to such restrictions respecting leases and alienation, as the President or Congress of

the United States may prescribe. When selections are so made or attempted to be made, as to produce injury to, or controversies between individuals, which cannot be settled by the parties, the matters of difficulty shall be investigated, and decided on equitable terms by the council of the tribe, subject to appeal to the agent, whose decision shall be final and conclusive.

ARTICLE 4. After the aforesaid selections shall have been made, the President shall immediately cause the residue of the ceded lands to be offered for sale at public auction, being governed in all respects in conducting such sale, by the laws of the United States for the sale of public lands, and such of said lands as may not be sold at public sale, shall be subject to private entry at the minimum price of United States lands, for the term of three years; and should any thereafter remain unsold, Congress may, by law, reduce the price from time to time, until the whole of said lands are disposed of, proper regard being had in making the reductions, to the interests of the Indians, and to the settlement of the country. And in consideration of the cessions hereinbefore made, the United States agree to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same.

ARTICLE 5. The said united tribe appreciate the importance and usefulness of the mission established in their country by the Board of the American Indian Mission Association, and desiring that it shall continue with them, they hereby grant unto said board a tract of one section of six hundred and forty acres of land, which they, by their chiefs, in connection with the proper agent of the board, will select; and it is agreed that after the selections shall have been made, the President shall issue to such

person or persons as the aforesaid board may designate, a patent for the same.

ARTICLE 6. The said Kaskaskias and Peorias, and the said Piankeshaws and Weas, have now, by virtue of the stipulations of former treaties, permanent annuities amounting in all to three thousand eight hundred dollars per annum, which they hereby relinquish and release, and from the further payment of which they forever absolve the United States; and they also release and discharge the United States from all claims or damages of every kind by reason of the non-fulfilment of former treaty stipulations, or of injuries to or losses of stock or other property by the wrongful acts of citizens of the United States; and in consideration of the relinquishments and releases aforesaid, the United States agree to pay to said united tribe, under the direction of the President, the sum of sixty-six thousand dollars, in six annual instalments, as follows: In the month of October, in each of the years one thousand eight hundred [1084] and fifty-four, one thousand eight hundred and fifty-five, and one thousand eight hundred and fifty-six, the sum of thirteen thousand dollars, and in the same month in each of the years one thousand eight hundred and fifty-seven, one thousand eight hundred and fifty-eight, and one thousand eight hundred and fifty-nine, nine thousand dollars, and also to furnish said tribe with an interpreter and a blacksmith for five years, and supply the smith shop with iron, steel, and tools, for a like period.

ARTICLE 7. The annual payments provided for in article six are designed to be expended by the Indians, chiefly in extending their farming operations, building houses, purchasing stock, agricultural implements, and such other things as may promote their improvement and comfort, and shall be so applied by them. But at their request it

is agreed that from each of the said annual payments the sum of five hundred dollars shall be reserved for the support of the aged and infirm, and the sum of two thousand dollars shall be set off and plied to the education of their youth; and from each of the first three there shall also be set apart and applied the further sum of two thousand dollars, to enable said Indians to settle their affairs. And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

ARTICLE 8. Citizens of the United States, or other persons not members of said united tribe, shall not be permitted to make locations or settlements in the country herein ceded, until after the selections provided for, have been made by said Indians; and the provisions of the act of Congress, approved March third, one thousand eight hundred and seven, in relation to lands ceded to the United States shall, so far as the same are applicable, be extended to the lands herein ceded.

ARTICLE 9. The debts of individuals of the tribe, contracted in their private dealings, whether to traders or otherwise, shall not be paid out of the general funds. And should any of said Indians become intemperate or abandoned, and waste their property, the President may withhold any moneys due or payable to such, and cause them to be paid, expended or applied, so as to ensure the benefit thereof to their families.

ARTICLE 10. The said Indians promise to renew their efforts to prevent the introduction and use of ardent spirits in their country, to encourage industry, thrift, and

morality, and by every possible means to promote their advancement in civilization. They desire to be at peace with all men, and they bind themselves not to commit depredation or wrong upon either Indians or citizens; and should difficulties at any time arise, they will abide by the laws of the United States in such cases made and provided, as they expect to be protected and to have their rights vindicated by those laws.

ARTICLE 11. The object of the instrument being to advance the interests of said Indians, it is agreed if it prove insufficient, from causes which cannot now be foreseen, to effect these ends, that the President may, by and with the advice and consent of the senate, adopt such policy in the management of their affairs, as, in his judgment, may be most beneficial to them; or, Congress may, hereafter, make such provisions by law as experience shall prove to be necessary.

ARTICLE 12. It is agreed that all roads and highways, laid out by authority of law, shall have right of way through the lands herein ceded and reserved, on the same terms as are provided by law, when roads and highways are made through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the lands of the said Indians, shall have right of way, on the payment of a just compensation therefor in money.

[1085] ARTICLE 13. It is believed that all the persons and families of the said combined tribe are included in the annexed schedule, but should it prove otherwise, it is hereby stipulated that such person or family shall select from the ten sections reserved as common property, the quantity due, according to the rules hereinbefore prescribed, and the residue of said ten sections or all of them as the case may be, may hereafter, on the request of the

chiefs, be sold by the President, and the proceeds applied to the benefit of the Indians.

ARTICLE 14. This instrument shall be obligatory on the contracting parties whenever the same shall be ratified by the President and the Senate of the United States.

In testimony whereof the said George W. Manypenny, Commissioner as aforesaid, and the delegates of the said combined tribe, have hereunto set their hands and seals, at the place and on the day and year first above written.

GEORGE W. MANYPENNY, Commissioner [L.S.]
Kio-Kaw-Mo-Zan, his x mark [L.S.]
Ma-Cha-Ko-Me-Ah, or David Lykins. [L.S.]
Sa-Wa-Ne-Ke-Ah, or Wilson, his x mark. [L.S.]
Sha-Cah-Quah, or Andrew Chick, his x mark. [L.S.]
Ta-Ko-Nah, or Mitchel, his x mark. [L.S.]
Che-Swa-Wa, or Rogers, his x mark. [L.S.]
Yellow Beaver, his x mark. [L.S.]

Executed in presence of—
Charles Calvert,
Jas. T. Wynne,
Robert Camptbell,
Wm. B. Waugh,
Ely Moore, *Indian Agent.*
Baptiste Peoria, his x mark, *U. S. Interpreter.*
Wm. B. Waugh, *witness to signing of Baptiste Peoria.*

* * *

(Schedule 10 Stat. 1085-1087 omitted)

[1087] And whereas the said treaty having been submited to the Senate of the United States for its constitutional action thereon, the Senate did, on the second day of August, eighteen hundred and fifty-four, ratify the same by a resolution in the words following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

*August 2, 1854.*

*Resolved,* (two-thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at the City of Washington this thirtieth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, Commissioner on the part of the United States, and the following named delegates representing the united tribes of Kaskaskia and Peoria, Piankeshaw and Wea Indians, viz: Kio-kaw-mo-zan, David Lykins; Sa-wa-ne-ke-ah, or Wilson; Sha-cah-quah, or Andrew Chick; Ta-ko-nah, or Mitchel; Che-swa-wa, or Rogers; and Yellow Beaver; they being duly authorized thereto by the said Indians.

Attest:

ASBURY DICKENS, *Secretary.*

Now, therefore, be it known that I, Franklin Pierce, President of the United States of America, do in pursuance of the advice and consent of the Senate, as expressed in their resolution of August second, one thousand eight hundred and fifty-four, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the City of Washington, this tenth day of August, in the year of our Lord eighteen
[Seal] hundred and fifty-four, and of the Independence of the United States, the seventy-ninth.

FRANKLIN PIERCE.

By the President:

W. L. MARCY

Secretary of State.

No. 219



In the

# Supreme Court of the United States

OCTOBER TERM, 1966

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,

*Defendant.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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*Of Counsel.*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

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*No.*

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THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.,

*Petitioners,*

*vs.*

THE UNITED STATES OF AMERICA,

*Defendant.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners, the Peoria Tribe of Indians of Oklahoma, et al., pray that a writ of certiorari issue to the United States Court of Claims to review the judgment of that Court entered in this case on December 16, 1966, rehearing denied March 17, 1967.

## OPINION BELOW

The opinion of the Court of Claims, December 16, 1966, rendered by three of the Court's five judges, together with the dissenting opinion of the other two, is reprinted as Appendix A. The decision is as yet unreported in the official reports.

## JURISDICTION

The judgment of the Court of Claims was entered on December 16, 1966; rehearing was denied on March 17, 1967. Jurisdiction is invoked under Section 20 of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70s(c) and 28 U.S.C. § 1255.

## TREATY INVOLVED

The treaty of May 30, 1854, 10 Stat. 1082, between petitioners and the United States is reprinted as Appendix B to this petition.

## QUESTION PRESENTED

Under a treaty which provides that the President may pay to an Indian tribe or invest for its benefit the proceeds of its lands to be sold by the Government as trustee, is the Government liable (as a private trustee would be) for failure to invest proceeds not realized by reason of a deliberate breach of its trust by the Government?

## STATEMENT OF THE CASE

On May 30, 1854, the effective date of the Kansas-Nebraska Act, 10 Stat. 277, which opened Kansas to white settlement, a treaty was concluded (10 Stat. 1082, Appendix B) whereby the petitioners ceded part of their Kansas reservation in trust to the United States, which undertook to offer the lands for sale at public auction, and to pay the proceeds, less expenses, to the Indians, subject to the following provision (Article 7):

> . . . And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, deter-

mine how much of the net proceeds of said sales shall be paid to them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

Following the Kansas-Nebraska Act, and the Act of July 22, 1854, 10 Stat. 308, which opened ceded Indian lands in Kansas to pre-emption (i.e., the statutory right of the first settler to acquire 160 acres of the public lands at a fixed price), "settlers, investors and speculators" squatted on the petitioners' land and claimed rights of preemption thereto. (15 Ind. Cl. Comm. 123, 143-4) In response to a request of the Secretary of the Interior for a legal opinion, the Attorney General stated that the allowance of pre-emption rights "would be a violation of the treaties*, a breach of trust, a fraud upon the Indians." (Pet. Ex. 166, J 1, p. 26, 15 Ind. Cl. Comm. 123, at 144.)

Nevertheless, under express instructions from the Commissioner of Indian Affairs, the squatters were permitted to buy petitioners' lands at fixed, "appraised" prices, without any auction. The consequence was, as determined by the Indian Claims Commission, that the sum realized from the sales was $172,726.04 less than it should have been, and the Commission awarded judgment to petitioners in that amount.

Petitioners also claimed an additional return, measured by interest, by reason of the Government's obligation to invest so much of the proceeds as was not paid to the Indians. This claim was denied. On petitioners' appeal, the Court of Claims, by a divided court, affirmed.

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* There were three such treaties. For the other two, see 10 Stat. 1048; 10 Stat. 1069.

## REASONS FOR GRANTING THE WRIT

### 1. The Question is Important

The decision of the Indian Claims Commission, from which the United States did not appeal, holds the United States liable for the non-performance of its obligation to sell the petitioners' land at public auction, but, as affirmed by the Court of Claims, relieves the United States of liability for the non-performance of any obligation to invest the proceeds.

The majority of the Court of Claims regards the provision for investment as discretionary, not mandatory, and therefore not actually an obligaton. The minority regards the obligation to invest as a mandatory alternative to non-payment to the Indians. The majority applies the rule of strict construction of the liability of the sovereign. The minority applies the rule that an Indian treaty is to be construed as the tribe would have understood it.

The question is important because the standards by which the United States is to be held to account as an express (and generally self-appointed) trustee of tribal property are important.

It is hardly to be doubted that a similar provision in a trust agreement with a private individual or corporation would require the trustee to invest trust funds acquired by him, and to be responsible for a failure to invest as well as for a failure conduct the sales properly. In this case, the United States has been held to a lower standard of performance, to the damage of an Indian tribe over which the United States, by its own sovereign will, has asserted the power of guardianship. In this case, the sovereign's statutory exemption from interest on claims against it has been in effect extended

to exemption from damages (at least in part) for breach of trust.

**2. The Decision is in Conflict With the Applicable Decisions of This Court**

The majority's decision violates two cardinal principles: (1) that discretion vested in a public officer for the benefit of others requires him to act (*Mason* v. *Fearson,* 9 How. 248, 259; *Supervisors* v. *United States,* 4 Wall. 435, 446-447), and (2) that an Indian treaty must be construed in the sense in which it would naturally be understood by the Indians (*Jones* v. *Meehan,* 175 U.S. 1, 11; *United States* v. *Shoshone Tribe,* 304 U.S. 111, 116; *Tulee* v. *Washington,* 315 U.S. 681, 684-685; *The Kansas* Indians, 5 Wall. 737, 760; *Choctaw Nation* v. *United States,* 119 U.S. 1, 27-28; *Minnesota* v. *Hitchcock,* 185 U.S. 373, 396; *United States* v. *Winans,* 198 U.S. 371, 380-381).

In *Mason* v. *Fearson;* 9 How. 248, 259, this Court upheld as a well-established doctrine

> that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been to "impose a positive and absolute duty".

That a similar doctrine is applicable to a treaty, which, when it is self-operating, is equivalent to an act of the legislature (*United States* v. *43 Gallons of Whiskey,* 93 U.S. 188, 196) is also required by the second of the two principles adverted to. As stated by Judge Davis in his dissenting opinion:

> The Treaty's use of "may", rather than "shall", should not be given the weight the court puts on it

to show the unlimited character of the President's discretion. This was not a carefully-drawn business contract between equals or even a Congressional enactment, but an Indian treaty. "[F]riendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed." *United States* v. *Shoshone Tribe, supra,* 304 U.S. at 116. "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan,* supra, 175 U.S. at 11. To the Peoria Tribe, Article 7 would have meant the same if it had said that the President "shall," instead "may", determine the way the funds were to be allocated. Their understanding, as I judge it, was that the monies turned over to them would be enough to satisfy their current wants, and the rest was to be invested for profit, with the increment accruing to their benefit. That was "the substance of the right without regard to technical rules." *United States* v. *Winans, supra,* 198 U.S. at 381.

Judge Davis points out that it is settled that "the mere fact that the United States did not pay the additional $172,000 in the 1850's, as it should have, would not, in itself, bar the Tribe from now collecting interest to which it would otherwise be entitled. See *United States* v. *Blackfeather,* 155 U.S. 180, 192 (1894); *Mille Lac Band of Chippewa* v. *United States,* 51 Ct. Cl. 400, 407-08 (1916); *Pawnee Tribe* v. *United States,* 56 Ct. Cl. 1, 15 (1920); *Menominee Tribe* v. *United States,* 107 Ct. Cl. 23, 33, 67 F. Supp. 972, 975 (1946); *Nez Perce Tribe* v. *United States,* Ct. Cl. ....., ..... (July 15, 1966)."

## CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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*Attorney for Petitioners*

LOUIS L. ROCHMES,
*Of Counsel.*

# APPENDICES

## APPENDIX "A"

## OPINION OF THE COURT OF CLAIMS

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 8—65

Ind. Cl. Comm. Docket No. 65
11 Ind. Cl. Comm. 171
15 Ind. Cl. Comm. 123, 488

(Decided December 16, 1966)

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, ET AL. v THE UNITED STATES

*Jack Joseph,* attorney of record, for appellants. *Louis L. Rochmes,* of counsel.

*Craig A. Decker,* with whom was *Assistant Attorney General Edwin L. Weisl, Jr.,* for appellee. *Ralph A. Barney,* of counsel.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS and COLLINS, *Judges.*

### OPINION

COWEN, *Chief Judge,* delivered the opinion of the court:

The Peoria Tribe seeks review of two adverse portions of a decision of the Indian Claims Commission which was generally favorable to the tribe. Two separate issues are involved on the appeal. The first concerns the payment given the Indians in place of certain annuities

which they relinquished in 1854. Before that year, the Weas and the Piankeshaws were the beneficiaries of permanent annuities coming to $3,800 per year. By the Treaty of May 30, 1854, 10 Stat. 1082, these groups joined with others to form the single Peoria Tribe (see *Peoria Tribe of Indians of Oklahoma* v. *United States,* 169 Ct. Cl. 1009 (1965)), and all agreed to give up those annuities (Art. 6). "[I]n consideration of the relinquishments and releases aforesaid", the United States agreed to pay the united tribe a total of $66,000 in six installments from 1854 to 1859, "and also to furnish said tribe with an interpreter and a blacksmith for five years, and supply the smith shop with iron, steel, and tools, for a like period."[1] The Indian Claims Commission found that the United States actually paid a total of $70,820 in discharge of these obligations, and appellants do not

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[1] Article 6 provided: "The said Kaskaskias and Peorias, and the said Piankeshaws and Weas, have now, by virtue of the stipulations of former treaties, permanent annuities amounting in all to three thousand eight hundred dollars per annum, which they hereby relinquished and release, and from the further payment of which they forever absolve the United States; and they also release and discharge the United States from all claims or damages of every kind by reason of the non-fulfilment of former treaty stipulations, or of injuries to or losses of stock or other property by the wrongful acts of citizens of the United States; and in consideration of the relinquishments and releases aforesaid, the United States agree to pay to said united tribe, under the direction of the President, the sum of sixty-six thousand dollars, in six annual instalments, as follows: In the month of October, in each of the years one thousand eight hundred and fifty-four, one thousand eight hundred and fifty-five, and one thousand eight hundred and fifty-six, the sum of thirteen thousand dollars, and in the same month in each of the years one thousand eight hundred and fifty-seven, one thousand eight hundred and fifty-eight, and one thousand eight hundred and fifty-nine, nine thousand dollars, and also to furnish said tribe with an interpreter and a blacksmith for five years, and supply the smith shop with iron, steel, and tools, for a like period."

now contest that figure. The Commission then found that the commuted value, as of 1854, of the released annuities (computed at a 5 percent interest rate) would be $76,000. Appellants also agree with this conclusion. But the Commission refused to award the tribe the difference between $76,000 and $70,820 (*i.e.*, $5,180), ruling that the consideration paid was not unconscionable even though it fell short by $5,180 of the true value of the released annuities. Appellant urge that this was error, and that they are entitled to a judgment for the $5,180.

We agree with the Commission that in the circumstances the payment of $70,820 for annuities worth $76,000 did not represent an unconscionable consideration, or indicate something less than fair and honorable dealings. The amount ultimately paid was 93 percent of the full value. This is a small discrepancy, both in percent and in absolute figures. Moreover, as the Commission pointed out, the consideration, according to the treaty, was to be $66,000 in cash plus the supplying of certain goods and services for 5 years; "it may well have been that the United States anticipated that the materials and services would amount to $10,000.00 thereby requiring the total of $76,000.00 to satisfy the obligations under Article 6." 11 Ind. Cl. Comm. 171, 178 (1962). At the time of the signing of the treaty this would have been a reasonable forecast, and it is proper to assess the worth of the consideration at that date rather than upon the basis of what may actually have occurred during the ensuing 5-year period from 1854 to 1859.

*The Miami Tribe of Oklahoma* v. *United States*, 150 Ct. Cl. 725, 140-42, 281 F. 2d 202, 211-12 (1960), *cert. denied*, 366 U.S. 924 (1961), does not require reversal of the Commission's determination. The court held that the consideration for a commuted annuity must be adequate, but in that instance the United States paid only 78 percent of the value and the difference in monetary terms was the large sum of $118,136.50; in addition, Miami Tribe did not have the factor of promised supplies and services which could reasonably be valued, prospectively, as making up the difference.

*Nez Perce Tribe of Indians* v. *United States*, 176 Ct. Cl. —— (July 1966), is distinguishable on comparable grounds. The court's opinion points out the significantly different elements supporting that claim; a minimum discrepancy of 33⅓ percent depriving the claimant of at least $566,045.77, with a consequent probable loss of interest of $200,000, thus raising the minimum discrepancy to about 50 percent—a large figure. The court carefully declared that it was not departing from the rule that, before a price disparity can be labeled unconscionable, it must be "very gross". In the present case we cannot call the small disparity "gross", let alone "very gross".

The second claim involves another provision of the 1854 treaty. Under Article 4, 10 Stat. 1083, the Federal Government agreed to sell some land owned by the Indians in Kansas at public auction, and "to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same". The Commission held that the United States breached these obligations by allowing white "settlers" to buy the lands at an appraised price, rather than selling the property in a freely competitive market at higher levels. The difference between the appraised values and the fair market value was found to be $172,726.04, and recovery was ordered in that amount.[2] Neither side questions this figure. The appellants urge, however, that the Commission erred in refusing to grant interest on this award from 1857 to the date of payment.

Appellants concede that the Government, absent its consent, has always been immune from an obligation to pay interest. "The right to claim and recover interest from the United States is purely a matter of grace * * *." *Richmond, F. & P. R.R. Co.* v. *United States*, 95 Ct. Cl.

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[2] The Commission found the fair market value of the land to have been $2.50 per acre in June-July 1857 (the time of sale). Since 207,758.85 acres were involved, the tribe should have received $519,397.13. The sum it actually received was $346,671.09. The difference is $172,726.04.

244, 259 (1942). The recovery of interest must be expressly provided for in a statute, treaty, or contract. Moreover, the consent necessary to waive governmental immunity from interest "must be affirmative, clear-cut, and unambiguous". *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585,590 (1947). As the Supreme Court stated in *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947):

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

See also *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951); *Cherokee Nation* v. *United States*, 270 U.S. 476 (1926).[3]

There is no contention that there was a constitutional taking of appellants' land. However, more than 100 years after the treaty was entered into and on the basis of a statute enacted many years later, the Indian Claims Commission determined that appellants are entitled to $172,726.04, an additional sum that would have been paid for the Indian lands if the Government had not

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[3] For an example of how strictly such a waiver of immunity has been construed, see *Anglin & Stevenson* v. *United States*, 160 F. 2d 670 (10th Cir. 1947), *cert. denied*, 331 U.S. 834, (1947), in which Rule 25 of the Circuit Court, in conformity with the related statute and having the force of law, provided that when a lower court judgment is affirmed "interest thereon shall be calculated and levied from the date of the judgment * * *." *Id.* at 672. The court held that this allowance of interest did not apply to a judgment against the United States, since Congress had not *expressly* consented to the payment of interest by the United States. *Cf. Nez Perce Tribe of Indians* v. *United States*, *supra*, slip op. pp. 12-13.

breached its agreement to sell the lands at public auction. As a result of these events, appellants maintain that if the additional proceeds now determined to be due had been realized when the lands were sold, the language of the 1854 treaty would have required the United States to pay interest on the $172,726.04 and, therefore, that they are now entitled to such interest. The claim is based solely on that portion of Article 7 of the 1854 treaty which reads:

> And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President *may*, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement. [Emphasis added.]

Whether we consider the foregoing language of the treaty separately and apart from the remainder of that document or whether we construe it in connection with other articles of the treaty, we arrive inescapably at the same conclusion: Article 7 of the treaty conferred discretion upon the President to invest the proceeds or not, as he saw fit. There is neither agreement nor consent by the United States to pay interest upon the proceeds.

The word "may" in Article 7 denotes that the signatories to the treaty vested in the President the discretion to pursue alternative courses of action. He could pay the proceeds directly to the Indians; he could *invest* them in "safe and profitable stocks"; or he could do both. There is no mandate that the President act in a single specified manner, and nowhere in the entire treaty may there be found an explicit promise by the Government to pay interest.[4]

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[4] Such a promise cannot, of course, be implied. *United States* v. *N.Y. Rayon Importing Co., supra.*

When we turn to other provisions of the same treaty, it is apparent that the framers of the treaty knew how to impose a duty or to express a promise, and for such purposes they used clear and explicit language such as "shall"[5] and "agree"[6]. The framers also know how to confer discretion; and when particular powers or actions called for discretion, the treaty spoke in terms of "may".[7] Thus the parties to the treaty knew how to express an "affirmative, clear-cut" obligation. *United States* v. *Thayer-West Point Hotel Co.*, *supra*. They did not do so in Article 7 concerning disposition of the proceeds.[8]

In pressing their claim for interest, appellants rely mainly upon the decision of the Supreme Court in *United States* v. *Blackfeather*, 155 U.S. 180 (1894). However, an examination of that decision demonstrates quite clearly that the treaty there considered contained a direct and unequivocal promise by the United States to pay five per-cent per annum on the proceeds of the sale of Indian lands. In the seventh article of the treaty before the Supreme Court in that case, it was agreed that the proceeds of the sale of Indian lands, after certain deductions had been made, "shall constitute a fund for the future necessities of said tribe, parties to this compact, *on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an*

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[5] See, *e.g.*, Articles 3, 4, and 5.

[6] See Article 6.

[7] See, *e.g.*, Articles 3, 4, 9, and 11.

[8] Therefore, we do not consider appellants' argument that Congress in the years immediately preceding the signing of the treaty construed a *promise* to invest in safe and profitable stocks as equivalent to a promise by the United States to pay interest on the sum to be "invested". Our concern here is solely with what the United States obligated itself to do; and as shown above, the United States did not even obligate itself to invest the proceeds. To invest or not was discretionary; hence, even if we were to find the claimed equivalency, we could find no *promise* to pay interest.

*annuity*". [Emphasis supplied.] 155 U.S. at 188. Although the promise of the United States to pay five percent annually on the fund was denominated in the treaty as an annuity, the Supreme Court held that the unqualified promise of the United States to pay an annuity of five percent was substantially the same as an agreement to pay interest in the same amount. That decision cannot be made to fit the case at bar, because in the treaty involved here there was no equivalent affirmative obligation to pay the Indians interest or to make any other type of payment on the proceeds of the sale of their lands, no matter how such payment may be denominated.

*Mille Lac Band of Chippewas* v. *United States*, 47 Ct. Cl. 415 (1912), *rev'd*, 229 U.S. 498 (1913), which is also relied upon by appellants, is equally inapplicable, because that case arose under the Act of January 14, 1889, 25 Stat. 642, which expressly provided for the payment of interest at the rate of five percent per annum on sums received from the sale of the Indian lands. 47 Ct. Cl. at 462.

In summary, the 1854 treaty clearly specified that the disposition of the proceeds of the land sales was left to the discretion of the President. Therefore, it would be judicial treaty-writing for us to read into that agreement an express promise by the Government to pay interest.[9]

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[9] Admittedly no interest is allowable for the breach of an obligation to pay over money to the Indians. *Confederated Salish and Kootenai Tribes* v. *United States*, 175 Ct. Cl. —— (May 1966), *cert. denied*, 385 U.S. 921 and *Ramsey* v. *United States*, 121 Ct. Cl. 426, 431-32, 101 F. Supp. 353 (1951), *cert. denied*, 343 U.S. 977 (1952). Any argument that the President was implicitly precluded from paying over more than was necessary to maintain the reasonable wants of the Indians is without merit. If such a limitation had been desired, it would have been expressly so provided in the treaty. *Cf.* Treaty with the Delawares, May 6, 1854, Art. 7, 10 Stat. 1048, 1050.

For the reasons stated above, we hold that appellants are not entitled to prevail on either of the issues raised in this appeal, and we therefore affirm the determinations of the Indian Claims Commission.

*Affirmed.*

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DAVIS, *Judge*, concurring in part and dissenting in part:

I join in the court's opinion on the first claim, but dissent from the disposition of the demand for interest on the $172,762.04 awarded by the Indian Claims Commission.

The sole ground for this claim is Article 7 of the 1854 Treaty, 10 Stat. 1084, which provided:

> And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

It is agreed that if this is read as containing an express provision for interest appellants can recover, otherwise not. See *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *Confederated Salish and Kootenai Tribes* v. *United States*, 175 Ct. Cl. ——, —— (May 13, 1966), *cert. denied*, Oct. 24, 1966. It is also settled that the mere fact that the United States did not pay the additional $172,000 in the 1850's, as it should have, would not, in itself, bar the Tribe from now collecting interest to which it would otherwise be entitled. See *United States* v. *Blackfeather*, 155 U.S. 180, 192 (1894); *Mille Lac Band of Chippewa* v. *United States*, 51 Ct. Cl. 400, 407-08 (1916); *Pawnee Tribe* v. *United States*, 56 Ct. Cl. 1, 15 (1920); *Menominee Tribe* v. *United States*, 107 Ct. Cl. 23, 33, 67 F. Supp. 972, 975 (1946); *Nez Perce Tribe* v. *United States*, 176 Ct. Cl. ——, —— (July 15, 1966).

These decisions show that, if the treaty had said in precise terms that the sums received from the sales should be deposited in the treasury at interest, there would be no question that appellants' position was correct. The issue for us is whether the actual words of the agreement gave the Peoria Tribe the same right to interest.

In resolving this question, we must remember that Indian treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938). "[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' *Tulee* v. *Washington*, 315 U.S. 681, 684-85." *Choctaw Nation* v. *United States*, 318 U.S. 423, 432 (1943).[1]

The 1854 treaty contemplated that the proceeds of the land sales would either be paid to the Indians, from time to time, or be invested by the Government so as to bear fruit.[2] There are two problems with the phrasing. The

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[1] The Supreme Court has often indicated that, where possible, such treaties are to be interpreted liberally in favor of the Indians. See *The Kansas Indians*, 5 Wall. (72 U.S.) 737, 760 (1866); *Choctaw Nation* v. *United States*, 119 U.S. 1, 27-28 (1886); *Jones* v. *Meehan*, 175 U.S. 1, 11 (1899); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 396 (1902); *United States* v. *Winans*, 198 U.S. 371, 380-81 (1905).

[2] It would be wholly inadmissible, in my view, to read the treaty as permitting the President simply to retain the money in the treasury without interest, instead of turning it over to the Indians or investing it. The court does not suggest that the President had this do-nothing option, which undoubtedly would have contravened the Indians' understanding.

first is that the directive to invest referred to "safe and profitable *stocks*", with "the *interest*" to be paid over to or expended for the Tribe (emphasis added). To borrow the language of the Supreme Court in the *Blackfeather* case, *supra*, 155 U.S. at 172, "while this is not literally an agreement to pay interest, it has substantially that effect". In *Blackfeather* the provision was in the form of an annuity measured by five percent on the Indians' money, but the Court looked through this shell to see that the treaty parties intended the Indians to receive the normal proceeds from their funds. Here the treaty refers to "stocks" and "interest" from those stocks, but it seems clear that the signatories likewise desired the Indians to receive the increment normally earned (if they were not to have the money in their own hands). For some years before this 1854 treaty, the Federal Government construed similar agreements calling for investment in "safe and profitable stocks" yielding "interest" of not less than five per cent as being satisfied by an appropriation, from year to year, of a sum equal to five per cent interest. See Annual Report of the Commissioner of Indian Affairs, Nov. 30, 1852, p. 10 (H. Doc. 1, pp. 300-01); Annual Report of the Commissioner of Indian Affairs, 1853, pp. 10-12 (H. Doc. 1, p. 263).[3] The only change in the 1854 treaty was the deletion of the specific reference to five per cent; the reason for this change seems to have been the wish to assure the Indians the possibility of a greater amount obtainable from pri-

[3] In recommending that such appropriations no longer be made, but that the principal be invested, the Commissioner of Indian Affairs said that the prior practice had "failed to execute" the treaty stipulations, but it is clear to me from the context that he was complaining of the costly drain on the treasury of the practice of continually appropriating the interest without any money coming into the treasury through investment of the principal, and that he well understood the past practice to be in substitution for the payment of the proceeds of investment. He thought, too, that the Indians would be advantaged by investing the money.

vate investments, not to cut off the Indians' right to the fair proceeds of their moneys which were retained by the Government and not handed over to them. *Ibid.* That right was preserved.

The other problem—the one with which the court's opinion treats—arises from the possibility that the President might have immediately turned over the whole $172,000 to the Indians, if it had been paid in 1857, without retaining any for investment.[4] This is, of course, a theoretical possibility, but it seems very unlikely as a practical matter. The President would not hand over to these dependent Indians more than they needed or could properly use for day-to-day expenses; nor could the Tribe expect to receive more than this. The comparable article of a contemporaneous treaty with the Delawares, 10 Stat. 1048, 1050 (1854), says expressly that the amounts to be paid over were to meet "current wants" and "reasonable wants",[5] and the Peoria Treaty would probably be interpreted in the same way. Thus, the President's discretion was not at large, but was to be exercised in consultation with the Indians and according to the standard of their need. On that basis, it is most unlikely that the large sum of $172,000 would have been paid over rather than invested. Only a minimum of speculation is needed, in my opinion, to find that the money would have borne

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[4] See footnote 2, *supra.*

[5] Article 7 of the Delaware treaty provided: "It is expected that the amount of moneys arising from the sales herein provided for, will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary."

fruit if the United States had accounted for it in the 1850's.

The Treaty's use of "may", rather than "shall", should not be given the weight the court puts on it to show the unlimited character of the President's discretion, This was not a carefully-drawn business contract between equals or even a Congressional enactment, but an Indian treaty. "[F]riendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed." *United States* v. *Shoshone Tribe, supra,* 304 U.S. at 116. "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan, supra,* 175 U.S. at 11. To the Peoria Tribe, Article 7 would have meant the same if it had said that the President "shall", instead of "may", determine the way the funds were to be allocated. Their understanding, as I judge it, was that the monies turned over to them would be enough to satisfy their current wants, and the rest was to be invested for profit, with the increment accruing to their benefit. That was "the substance of the right without regard to technical rules." *United States* v. *Winans, supra,* 198 U.S. at 381.

The Supreme Court's decision in *Blackfeather, supra,* 155 U.S. at 188, 192-93, supports, I think, this practical and nontechnical reading of the appellants' treaty. In that case the agreement calling for a five percent "annuity" on a fund composed of proceeds of Indian land sales provided further that the fund was to continue "during the pleasure of Congress, unless the chief of the said tribes or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created, should be dissolved and paid over to them; in which case the President shall cause the same to be so paid, if in his discretion, he shall believe the happiness and prosperity of said tribe would be promoted thereby." Under this stipulation the fund was dissolved and paid over in 1852. But when the Supreme

Court agreed in 1894 with this court that judgment should be entered against the United States for certain sums not credited the Indians at the time of the sale (in 1840), the Court ruled that interest on that amount should be paid, not only until 1852, but until the judgment was paid (sometime after 1894). "If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity continues until the money is paid over." 155 U.S. at 193. This, I take it, was a refusal to hold that the Indians were barred from collecting interest from 1852 to 1894 because they could not prove that the omitted sum would not have been distributed in 1852 along with the other monies. Similarly, in the present case, the appellant Tribe, which did not in fact receive the $172,000 in the 1850's should not be precluded from obtaining interest because it cannot prove conclusively that that sum would have been invested, rather than paid over at once, if the United States had sold the lands at public auction as it should have.

To construe the 1854 Treaty as providing for interest would not conflict with any decision of this court. In *Confederated Salish and Kootenai Tribes* v. *United States, supra,* 175 Ct. Cl. ——, —— (May 13, 1966), *cert. denied,* Oct. 24, 1966, the opinion assumed that a statute requiring deposit in the treasury of "all sums received on account of sales of Indian trust lands", and declaring that interest was to be paid on these deposits, would have applied to monies improperly withheld from the Indians, if it were not for a later act partially modifying the earlier legislation. In *Nez Perce Tribe* v. *United States, supra,* 176 C. Cl. ——, —— (July 15, 1966), the particular treaty specified a precise sum to bear interest ($1,000,000), and "did not make the trust open-ended. * * * The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear

interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon [*i.e.*, $1,626,222] and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest." The present treaty, in contrast, is open-ended in its terms; it covers, not a specified sum, but all the net proceeds and receipts from the sales. The $172,000 represents a major part of the proceeds which should have been set apart for the Tribe and invested.[5]

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DURFEE, *Judge,* joins in the foregoing opinion concurring in part and dissenting in part.

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[5] It is irrelevant that an award of interest, pursuant to the 1854 treaty, could increase the award to plaintiff by five or six times. If the treaty so provides, we cannot refuse interest because the amount is relatively large.

## APPENDIX "B"

### TREATY OF MAY 30, 1854, 10 Stat. 1082

FRANKLIN PIERCE,
PRESIDENT OF THE UNITED STATES
OF AMERICA:

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Whereas a treaty was made and concluded on the thirtieth day of May, one thousand eight hundred and fifty-four, by George W. Manypenny, Commissioner on the part of the United States, and the following named delegates of the united tribes of Kaskaskia and Peoria, Piankeshaw and Wea Indiana, viz: Kio-kaw-mo-zan, David Lykins; Sa-wa-ne-ke-ah, or Wilson; Sha-cah-qua, or Andrew Chick; Ta-co-nah, or Mitchell; Che-swa-wa, or Rogers; and Yellow Beaver, thereto duly authorized by said tribes; which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded at the City of Washington this thirtieth day of May one thousand eight hundred and fifty-four, by George W. Manypenny, Commissioner on the part of the United States, and the following named delegates representing the united tribes of Kaskaskia and Peoria, Piankashaw and Wea Indians, viz: Kio-kaw-mo-zan, David Lykins; Sa-wa-ne-ke-ah, or Wilson; Sha-cah-quah, or Andrew Chick; Ta-ko-nah, or Mitchel; Che-swa-wa, or Rogers; and Yellow Beaver, they being duly authorized thereto by the said Indians.

Article 1. The tribes of Kaskaskia and Peoria Indians, and of Piankeshaw and Wea Indians, parties to the two

treaties made with them respectively by William Clark, Frank J. Allen, and Nathan Kouns, Commissioners on the part of the United States, at Castor Hill, on the twenty-seventh and twenty-ninth days of October, one thousand eight hundred and thirty-two, having recently in joint council assembled, united themselves into a single tribe, and having expressed a desire to recognized and regarded as such, the United States hereby assent to the action of said joint council to this end, and now recognize the delegates who sign and seal this instrument as the authorized representatives of said consolidated tribe.

Article 2. The said Kaskaskias and Peorias, and the said Piankeshaws and Weas, hereby cede and convey to the United States, all their right, title and interest in and to the tracts of country granted and assigned to them, respectively by the fourth article of the treaty of October twenty-seventh, and the second article of the treaty of October twenty-ninth, one thousand eight hundred and thirty-two, for a particular description of said tracts, reference being had to said articles; excepting and reserving therefrom a quantity of land equal to one hundred and sixty acres for each soul in said united tribe, according to a schedule attached to this instrument, and ten sections additional, to be held as the common property of the said tribe,—and also the grant to the American Indian Mission Association, hereinafter specifically set forth.

Article 3. It is agreed that the United States, shall as soon as it can conveniently be done, cause the lands hereby ceded to be surveyed as the public lands are surveyed; and, that the individuals and heads of families shall, within ninety days after the approval of the surveys, select [1083] the quality of land therefrom, to which they may be respectively entitled as specified in the second article

hereof; and that the selections shall be so made, as to include in each case, as far as possible, the present residences and improvements of each—and where that is not practicable, the selections shall fall on lands in the same neighborhood; and if, by any reason of absence or otherwise the above mentioned selections shall not all be made before the expiration of said period, the chiefs of the said united tribe shall proceed to select lands for those in default; and shall also, after completing said last named selections, choose the ten sections reserved to the tribe; and said chiefs, in the execution of the duty hereby assigned them, shall select lands lying adjacent to or in the vicinity of those that have been previously chosen by individuals. All selections in this article provided for, shall be made in conformity with the legal subdivisions of the United States lands, and shall be reported immediately in writing, with apt descriptions of the same, to the agent for the tribe. Patents for the lands selected by or for individuals or families may be issued subject to such restrictions representing leases and alienation, as the President or Congress of the United States may prescribe. When selections are so made or attempted to be made, as to produce injury to, or controversies between individuals, which cannot be settled by the parties, the matters of difficulty shall be investigated, and decided on equitable terms by the council of the tribe, subject to appeal to the agent, whose decision shall be final and conclusive.

Article 4. After the aforesaid selections shall have been made, the President shall immediately cause the residue of the ceded lands to be offered for sale at public auction, being governed in all respects in conducting such sale, by the laws of the United States for the sale of public lands, and such of said lands as may not be sold at public sale, shall be subject to private entry at the minimum price

of United States lands, for the term of three years; and should any thereafter remain unsold, Congress may, by law, reduce the price from time to time, until the whole of said lands are disposed of, proper regard being had in making the reductions, to the interests of the Indians, and to the settlement of the country. And in consideration of the cessions hereinbefore made, the United States agree to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same.

Article 5. The said united tribe appreciate the importance and usefulness of the mission established in their country by the Board of the American Indian Mission Association, and desiring that it shall continue with them, they hereby grant unto said board a tract of one section of six hundred and forty acres of land, which they, by their chiefs, in connection with the proper agent of the board, will select; and it is agreed that after the selections shall have been made, the President shall issue to such person or persons as the aforesaid board may designate, a patent for the same.

Article 6. The said Kaskaskias and Peorias, and the said Piankeshaws and Weas, have now, by virtue of the stipulations of former treaties, permanent annuities amounting in all to three thousand eight hundred dollars per annum, which they hereby relinquish and release, and from the further payment of which they forever absolve the United States; and they also release and discharge the United States from all claims or damages of every kind by reason of the non-fulfilment of former treaty stipulations or of injuries to or losses of stock or other property by the wrongful acts of citizens of the United States; and in consideration of the relinquishments and

releases aforesaid, the United States agree to pay to said united tribe, under the direction of the President, the sum of sixty-six thousand dollars, in six annual installments, as follows: In the month of October, in each of the years one thousand eight hundred [1084] and fifty-four, one thousand eight hundred and fifty-five, and one thousand eight hundred and fifty-six, the sum of thirteen thousand dollars, and in the same month in each of the years one thousand eight hundred and fifty-seven, one thousand eight hundred and fifty-eight, and one thousand eight hundred and fifty-nine, nine thousand dollars, and also to furnish said tribe with an interpreter and a blacksmith for five years, and supply the smith shop with iron, steel, and tools, for a like period.

Article 7. The annual payments provided for in article six are designed to be expended by the Indians, chiefly in extending their farming operations, building houses, purchasing stock, agricultural implements, and such other things as may promote their improvement and comfort, and shall be so applied by them. But at their request it is agreed that from each of the said annual payments the sum of five hundred dollars shall be reserved for the support of the aged and infirm, and the sum of two thousand dollars shall be set off and plied to the education of their youth; and from each of the first three there shall also be set apart and applied the further sum of two thousand dollars, to enable said Indians to settle their affairs. And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks,

the interest to be annually paid to them, or expended for their benefit and improvement.

Article 8. Citizens of the United States, or other persons not members of said united tribe, shall not be permitted to make locations or settlements in the country herein ceded, until after the selections provided for, have been made by said Indians; and the provisions of the act of Congress, approved March third, one thousand eight hundred and seven, in relation to lands ceded to the United States, shall, so far as the same are applicable be extended to the lands herein ceded.

Article 9. The debts of individuals of the tribe, contracted in their private dealings, whether to traders or otherwise, shall not be paid out of the general funds. And should any of said Indians become intemperate or abandoned, and waste their property, the President may withhold any moneys due or payable to such, and cause them to be paid, expended or applied, so as to ensure the benefit thereof to their families.

Article 10. The said Indians promise to renew their efforts to prevent the introduction and use of ardent spirits in their country, to encourage industry, thrift, and morality, and by every possible means to promote their advancement in civilization. They desire to be at peace with all men, and they bind themselves not to commit depredation or wrong upon either Indians or citizens; and should difficulties at any time arise, they will abide by the laws of the United States in such cases made and provided, as they expect to be protected and to have their rights vindicated by those laws.

Article 11. The object of the instrument being to advance the interests of said Indians, it is agreed if it prove

insufficient, from causes which cannot now be foreseen, to effect these ends, that the President may, by and with the advice and consent of the senate, adopt such policy in the management of their affairs, as, in his judgment, may be most beneficial to them; or, Congress may, hereafter, make such provisions by law as experience shall prove to be necessary.

Article 12. It is agreed that all roads and highways, laid out by authority of law, shall have right of way through the lands herein ceded and reserved, on the same terms as are provided by law, when roads and highways are made through the lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the lands of the said Indians, shall have the right of way, on the payment of a just compensation therefor in money.

[1085] Article 13. It is believed that all the persons and families of the said combined tribe are included in the annexed schedule, but should it prove otherwise, it is hereby stipulated that such person or family shall select from the ten sections reserved as common property, the quantity due, according to the rules hereinbefore prescribed, and the residue of said ten sections or all of them as the case may be, may hereafter, on the request of the chiefs, be sold by the President, and the proceeds applied to the benefit of the Indians.

Article 14. This instrument shall be obligatory on the contracting parties whenever the same shall be ratified by the President and the Senate of the United States.

In testimony whereof the said George W. Manypenny, Commissioner as aforesaid, and the delegates of the said combined tribe, have hereunto set their hands and seals, at the place and on the day and year first above written.

George W. Manypenny, Commissioner [L.S.]

Kio-Kaw-Mo-Zan, his x mark. [L.S.]
Ma-Cha-Ko-Me-Ah, or David Lykins. [L.S.]
Sa-Wa-Ne-Ke-Ah, or Wilson, his x mark. [L.S.]
Sha-Cah-Quah, or Andrew Chick, his x mark. [L.S.]
Ta-Ko-Nah, or Mitchel, his x mark. [L.S.]
Che-Swa,Wa, or Rogers, his x mark. [L.S.]
Yellow Beaver, his x mark. [L.S.]

Executed in presence of—
Charles Calvert,
Jas. T. Wynne,
Robert Campbell,
Wm. B. Waugh,

Ely Moore, *Indian Agent.*

Baptiste Peoria, his x mark, *U. S. Interpreter.*

Wm. B. Waugh, *witness to signing of Baptiste Peoria.*

* * *

(Schedule 10 Stat. 1085-1087 omitted)

[1087] And whereas the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the second day of August, eighteen hundred and fifty-four, ratify the same by a resolution in the words following, to wit:

IN EXECUTIVE SESSION,
SENATE OF THE UNITED STATES,

*August 2, 1854.*

*Resolved,* (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at the City of Washington this thirtieth day of May, one thousand eight hundred and fifty-four,

by George W. Manypenny, Commissioner on the part of the United States, and the following named delegates representing the united tribes of Kaskaskia and Peoria, Piankeshaw and Wea Indians, viz: Kio-kaw-mo-zan, David Lykins, Sa-wa-ne-ke-ah, or Wilson; Sha-cah-quah, or Andrew Chick; To-ko-nah, or Mitchell; Che-swa,wa, or Rogers; and Yellow Beaver; they being duly authorized thereto by the said Indians.

Attest:

Asbury Dickens, *Secretary.*

Now, therefore, be it known that I, Franklin Pierce, President of the United States of America, do in pursuance of the advice and consent of the Senate, as expressed in their resolution of August second, one thousand eight hundred and fifty-four, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the City of Washington, this tenth day of August, in the year of our Lord, eighteen
[Seal] hundred and fifty-four, and of the Independence of the United States, the seventy-ninth.

Franklin Pierce.

By the President:
W. L. Marcy
Secretary of State.

No. 219

# In the Supreme Court of the United States

OCTOBER TERM, 1967

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

THURGOOD MARSHALL,
*Solicitor General,*
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# In the Supreme Court of the United States

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*v.*

UNITED STATES OF AMERICA

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–15a) is reported at 369 F. 2d 1001.

### JURISDICTION

The judgment of the Court of Claims was entered on December 16, 1966. A motion for rehearing was denied on March 17, 1967. The petition for a writ of certiorari was filed on June 5, 1967. The jurisdiction of this Court is invoked under 25 U.S.C. 70s(c) and 28 U.S.C. 1255.

### QUESTION PRESENTED

Whether a treaty provision—providing that the President may determine either to turn over the proceeds from sales of Indian land to the tribe, or to

invest them and pay over any earned annual interest, or to turn over part and invest part—is an express provision for the payment of interest on a judgment against the United States compensating for the low sales prices of the lands.

## TREATY INVOLVED

The relevant portion of Article 7 of the Treaty of May 30, 1854, 10 Stat. 1082, 1084, between the petitioners and the United States, provides:

> And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

## STATEMENT

The Peoria Indians alleged before the Indian Claims Commission that the United States had sold certain of their lands at an appraised value rather than at public auction, contrary to the terms of the Treaty of May 30, 1854, 10 Stat. 1082. In its decision, the Commission held that the United States had breached the treaty conditions in the sale of the land, and it awarded the Peoria Tribe a judgment of $172,726.04, as the difference between the price at which the lands were sold and their fair market value. The Peoria Tribe appealed on the ground that interest should have been allowed on that judgment. The Court of Claims affirmed the Commission (two judges dissenting in part).

## ARGUMENT

The decision of the Court of Claims is correct. It is consistent with other decisions of that court and does not conflict with any decision of this Court. Moreover, the case is of narrow significance because of the specific Indian treaty involved. Therefore, we believe, further review is not warranted.

The law is clear that, aside from Fifth Amendment takings of property, the United States does not pay interest on judgments unless it has expressly consented in "affirmative, clear-cut, unambiguous" terms.[1] *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 590; *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654. The same principle applies with equal vigor in Indian cases. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48; *Cherokee Nation* v. *United States*, 270 U.S. 476; *Loyal Creek Indians* v. *United States*, 118 Ct. Cl. 373, 97 F. Supp. 426, certiorari denied, 342 U.S. 813; *Confederated Salish and Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451, certiorari denied, 385 U.S. 921; *Nez Perce Tribe* v. *United States*, 176 Ct. Cl. 815, certiorari denied, 386 U.S. 984.

The specific treaty between the United States and the petitioners did not require that the United States pay interest. As the court stated (Pet. App. 6a):

> Whether we consider the foregoing language of the treaty separately and apart from the

[1] "Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. 2516(a).

> remainder of that document or whether we construe it in connection with other articles of the treaty, we arrive inescapably at the same conclusion: Article 7 of the treaty conferred discretion upon the President to invest the proceeds or not, as he saw fit. There is neither agreement nor consent by the United States to pay interest upon the proceeds.

The court further observed (Pet. App. 6a):

> The word "may" in Article 7 denotes that the signatories to the treaty vested in the President the discretion to pursue alternative courses of action. He could pay the proceeds directly to the Indians; he could *invest* them in "safe and profitable stocks"; or he could do both. There is no mandate that the President act in a single specified manner, and nowhere in the entire treaty may there be found an explicit promise by the Government to pay interest.

The dissenting judges below would have construed the treaty as requiring the investment of all funds that either accured or should have accrued from the sales of land. However, as the majority stated (Pet. App. 8a): "[T]he 1854 treaty clearly specified that the disposition of the proceeds of the land sales was left to the discretion of the President. Therefore, it would be judicial treaty-writing for us to read into that agreement an express promise by the Government to pay interest." Moreover, the case principally relied upon by the dissent below (*United States* v. *Blackfeather*, 155 U.S. 180) is clearly distinguishable. The treaty there involved specifically stated that the United States would pay the tribe annually "five

per centum * * * as an annuity" on the fund, which was made up of the proceeds of land sales less certain deductions. There was no discretion, as here, to pay over the principal of the fund in whole or in part. Thus, the Court could conclude in *Blackfeather* (155 U.S. at 193): "If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per-cent upon this amount until the whole fund was paid over." That conclusion cannot be drawn in this case.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
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In the

# Supreme Court of the United States

OCTOBER TERM, 1967

## No. 219

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA

*Respondent.*

On Writ of Certiorari to the United States Court of Claims

Petition for Certiorari Filed June 5, 1967

Certiorari Granted October 9, 1967

## BRIEF FOR THE PETITIONERS THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

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THE PEORIA TRIBE OF INDIANS
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On Writ of Certiorari to the United States
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Petition for Certiorari Filed June 5, 1967

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Certiorari Granted October 9, 1967

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# BRIEF FOR THE PETITIONERS THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.

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The Peoria Tribe of Indians of Oklahoma, et al., pursuant to the order of this Court entered October 9, 1967, granting their petition for certiorari, submit this brief on the merits of their appeal.

## OPINION BELOW

The opinion of the Court of Claims, December 16, 1966, in which three of that Court's five judges were joined, and the dissenting opinion of the other two, are reprinted in the Appendix (A. 68, 75). The case is reported at 369 F. 2d 1001.

## JURISDICTION

The judgment of the Court of Claims was rendered on December 16, 1966; rehearing was denied on March 17, 1967. The petition for a writ of certiorari was filed on June 5, 1967. The order granting the writ of certiorari was entered October 9, 1967. The jurisdiction of this Court is invoked under Section 20 of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70s (c) and 28 U.S.C. 1255.

## TREATY INVOLVED

Article 7 of the treaty of May 30, 1854, 10 Stat. 1082, 1084, between petitioners and the United States, in part, provides:

> • • • And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

The complete treaty (10 Stat. 1082-1087) is reprinted in the Appendix (A. 101-109).

## QUESTION PRESENTED

Under a treaty which provides that the President may pay to an Indian tribe or invest for its benefit the proceeds of its lands to be sold by the Government as a trustee, is the Government liable (as a private trustee would be) for failure to invest proceeds not realized by reason of a deliberate breach of its trust by the Government?

## STATEMENT OF THE CASE

On May 30, 1854, the effective date of the Kansas-Nebraska Act, 10 Stat. 277, which opened Kansas to white settlement, a treaty was concluded whereby the petitioners ceded part of their reservation in trust to the United States, which undertook to offer the lands for sale at public auction, and to pay the proceeds, less expenses, to the Indians, subject to the following provision (Article 7, A. 105-6):

> And as the amount of the annual receipts from the sale of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

Following the Kansas-Nebraska Act, and the Act of July 22, 1854, 10 Stat. 308, which opened ceded Indian lands in Kansas to pre-emption (*i.e.*, the statutory right of the first settler to acquire 160 acres of the public lands at a fixed price), "settlers, investors and speculators" squatted on the petitioners' land and claimed

rights of pre-emption thereto. (15 Ind. Cl. Comm. 123, 143-4, A. 36). In response to a request of the Secretary of the Interior for a legal opinion, the Attorney General stated that the allowance of pre-emption rights under this and two other treaties (for the other two see 10 Stat. 1048 and 10 Stat. 1069) "would be a violation of the treaties, a breach of trust, a fraud upon the Indians." (Pet. Ex. 166, J 1, p. 26, 15 Ind. Cl. Comm. 123, at 144, A. 36-37).

Nevertheless, under express instructions from the Commissioner of Indian Affairs, the squatters were permitted to buy petitioners' lands at fixed, "appraised" prices, without any auction. The consequence was, as determined by the Indian Claims Commission, that the sum realized was $172,726.04 less than would have been realized under a fair and free auction in accordance with the terms of the treaty, and the Commission awarded judgment to petitioners in that amount. (A. 66A, 67)

The actual proceeds of the sales amounted to $346,671.09 (Finding 27, A. 42). Of this sum, $59,641.24 was paid over to the Indians, and the balance, plus other tribal funds, was invested in state bonds. (A. 92) (The reference in Article 7 to "stocks" apparently signified, in the terminology of the time, the present-day term, bonds. See *Cherokee Nation* v. *United States,* 270 U.S. 476, 492.)

Before the Indian Claims Commission, petitioners claimed both the proceeds that should have been realized, and a return, measured by interest, by reason of the Government's obligation to invest so much of the proceeds as was not paid to the Indians. The Indian Claims Commission allowed the first portion of the claim, but denied the latter. On petitioners' appeal, the Court of Claims, by a divided court, affirmed.

## SUMMARY OF ARGUMENT

The amount by which the proceeds of the sales fell short of what they should have been were, by reason of that fact, neither paid nor invested. Petitioners' claim for the resulting loss of interest was rejected by a majority of the Court of Claims on the ground that Article 7 vested discretion in the President to choose between two alternatives, and, had the money been received in 1857 (as it should have been), the President might have paid it to the Indians. The Court below defined the President's discretion as follows: "He could pay the proceeds directly to the Indians; he could *invest* them in 'safe and profitable stocks'; or he could do both." (Emphasis the Court's, A. 42) Employing general rules of construction applicable to the running of interest on claims against the United States, the Court concluded with respect to Article 7 that, "[I]t would be judicial treaty writing for us to read into that agreement an express promise by the Government to pay interest."

Petitioners submit that the majority of the Court of Claims erred:

(1) The majority below speculated that, had the unrealized $172,726.04 been collected in 1857, the President, by virtue of his discretion under Article 7, might have decided that the money be paid to the Indians. If so, it would not have been invested. On that assumption, interest is denied as though the unrealized funds had in fact been realized and paid over to the Indians in 1857. But what the President might have done is wholly irrelevant. It was the Government's breach, not the President's discretion, which dictated the result: The Indians had neither the money nor the investment. Because the money had not been collected, the President was not called upon to exercise his discretion.

(2) The majority's view of the treaty fails to take the *purpose* of the treaty into account. The power of the guardian-trustee to determine to what extent the ward-beneficiary should live within the ward's income or should dip into its capital is not a power to withhold or reduce that capital by wrongful act, or to let the capital lie idle. The evidence of record supports the reasoning in the dissenting opinion that, under this treaty, "The President would not hand over to these dependent Indians more than they needed or could properly use for day-to-day expenses; nor could the Tribe expect to receive more than this." (A. 78.)

(3) Apparently on the assumption (which is not expressed, however) that the meaning of the treaty language is in doubt, the majority applied an improper rule of construction. In this case, however, the meaning of the treaty is not in doubt. If any doubt exists, the rule of construction appropriate to an Indian treaty, ignored by the majority, is that quoted in the dissenting opinion: That Indian treaties ". . . 'are to be construed as far as possible in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people" *Tulee* v. *Washington,* 315 U.S. 681, 684-5' *Choctaw Nation* v. *United States,* 318 U.S. 423, 432 (1943)" and other cases cited.

(4) The appropriate measure of damages which should be assessed against the Government for its breach of Article 7 of the 1854 treaty is the interest on $172,726.04 from the date of the sales, when that sum should have been realized and have become subject to said Article.

## ARGUMENT

### 1. THE GOVERNMENT'S OBLIGATION UNDER ARTICLE 7 IS NOT DIMINISHED BY THE DISCRETION WHICH THE PRESIDENT MIGHT HAVE EXERCISED IN 1857 HAD THE GOVERNMENT NOT BREACHED THE TREATY.

A majority of the Court of Claims found that under Article 7, the President would have had the choice of paying over to the Indians the sum which should have been realized, or of investing it on their behalf. Because of the existence of this choice, the majority finds that Article 7 was *discretionary* and did not constitute a *promise.* (See *inter alia* Note 8 to the Court's opinion, A. 74.) Equating the choice open to the President under Article 7 with the absence of a promise is a confusion containing unexpressed assumptions which are contrary to law and fact.

In the first place, the existence and purpose of vesting discretion in a public official are, as a matter of law, consistent with duty and obligation, not antithetical, as the Court below assumes. In *Mason* v. *Frearson,* 9 How. 248, 259, this Court held as an established rule the principle that discretion in legislative enactments is required to be exercised in favor of the parties for whose benefit it was conferred:

> Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds they ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty".

Article 11 of the 1854 treaty explicitly notes that, "The object of this instrument [is] to advance the interests of said Indians. . ." and it is clear that the power in Article 7 is conferred upon the President for the *benefit* of the Peoria Indians, thus bringing this case under the rule. (An Indian treaty is equivalent to the act of a legislative body: *United States* v. *43 Gallons of Whiskey,* 93 U.S. 188, 196; *Firks & Elam* v. *Neilson,* 2 Pet. 314.) In addition to *Mason* v. *Frearson,* other cases to the same effect are *Supervisors* v. *United States,* 4 Wall. 435, 18 L. Ed. 419 (wherein the words "may, if deemed advisable", were under this doctrine, held to require public officers to act); *City of Galena* v. *Amy,* 72 U.S. 705 (wherein "may, if said city council believe that the public good and best interest of the city require" was held to confer so clear a duty that a writ of mandamus would issue to compel action); *Wilson* v. *United States,* 135 F 2d 1005 (CCA 3); *Chase* v. *United States,* 261 Fed. 833, 837, affirmed 256 U.S. 1. It is appropriate to apply the rule of these authorities to this case, since as noted more particularly in 2 following, the *purpose* of these and other provisions in the 1854 treaty was to impose the discretion in the President for the very purpose of withholding the Indians' capital from their own improvident hands.

Further, the discretion is not material because the Government's breach made its exercise impossible. The money was neither paid to the Peoria Indians in 1857 nor invested because it was not collected. It was not collected because the Government breached its treaty. The breach prevented the President from exercising either course open to him under the treaty.

The majority below regards the President's discretion as limited to a choice between payment and investment, but the effect of the decision is to condone, without

saying so, a third course by the President, *i.e.*, to do neither. The result appears to be inconsistent with the Court's own reasoning. The result is certainly inconsistent with the duties of the trustee to see to it that the Indians' capital, if not available to the Indians, was productively employed.

The fact that there was an option to pay rather than invest cannot affect funds which the United States by its own breach divested itself of power either to pay or to invest. This Court had before it a similar situation in *Mille Lac Chippewas* v. *United States,* 229 U.S. 498. The Act of January 14, 1889, 25 Stat. 642, provided for the sale of timber lands of the Mille Lac Chippewas and the deposit of the proceeds in the Treasury to draw interest at 5 percent per annum. Instead of selling the lands as timber lands, the Government permitted the lands to be settled under the Public Land Laws, which brought a lower return to the Indians. The United States was held liable for the unrealized proceeds plus interest as provided in the statute. As in the case of the Peoria treaty, the statute provided an option to utilize part of the principal for the benefit of the Indians. Sec. 7, 25 Stat. 645. In the *Mille Lac* case the option was to be exercised within the discretion of Congress, not in the discretion of the President, and the option was limited to 5 percent of the principal and not unlimited, as in the present case. But who may exercise the option, and the extent to which it may be exercised, has no bearing on the result. Since the Indians had a right to interest on the proceeds of land sales, they were held to have a right to interest on the proceeds which should have been realized had the land sales been properly conducted, and the right was not read out of the statute by reason of the alternative available to the United States. Whether the United States simply withholds funds which it is

required to invest, or whether the funds remain with land buyers in whose interest the Government's breach of trust occurred (as is the case here), should likewise have no bearing on the Government's liability. See also *United States* v. *Blackfeather,* 155 U.S. 180, 192; *Menominee Tribe* v. *United States,* 107 C. Cl. 23, 33, 67 F. Supp. 972, 975 (1946).*

The majority of the Court of Claims erred in its view that the vesting of discretion in the President by Article 7 of the 1854 treaty was necessarily inconsistent with an obligation to exercise that discretion in favor of the Peoria Indians. Petitioners submit that the opposite is the case, and that the Government's first treaty breach (its failure to sell the lands at fair auction as required by Article 4) does not excuse the Government's second breach (its failure to exercise the trust which it assumed by Article 7).

**2. TREATING UNREALIZED FUNDS AS IF THEY HAD BEEN PAID DEFEATS THE PURPOSE OF THE TREATY, WHICH WAS TO PAY IMPROVIDENT INDIANS ONLY SO MUCH AS THEIR IMMEDIATE NEEDS REQUIRED AND TO INVEST THE REMAINDER FOR THEIR BENEFIT.**

Considering unrealized funds as proceeds which might not have been paid in 1857, and consequently might not have been invested, the Court below concluded, now that the funds are finally to be paid in fact, that they should be treated as uninvested and therefore as non-interest

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* The fact that funds were not made available in 1857 was not the basis of the decision in the Court below. The majority accepted the proposition that, if the treaty is to be construed as carrying an obligation to pay interest on uninvested funds, such interest would be payable on the unrealized proceeds (See A. 73-4).

bearing funds. Such a construction ignores one of the central purposes of the treaty; namely, that of providing for and obtaining the Indians' acknowledgement of their improvidence and putting them on notice that the President did not intend for them to have immediate use of all the funds, but that he intended to invest them for their benefit.

In this connection, it should be noted that the 1854 treaty provides that, even as to monies which are to be paid immediately thereunder, that the President may withhold payment to any who "become intemperate or abandoned, and waste their property" (Article 9, A. 106); that the Peorias will "renew their efforts to prevent the introduction and use of ardent spirits. . . . to encourage industry, thrift, and morality, and by every means promote their advancement in civilization" (Article 10, A. 106-7); that because "the object of the instrument [is] to advance the interest of the Indians, it is agreed" that the United States can unilaterally determine to manage their affairs (Article 11, A. 107). In the references to illiterate Indians in danger of becoming intemperate and abandoned, and of wasting their lands, threatened by the use of ardent spirits and needing encouragement in industry, thrift, morality and civilization, the United States was formally recognizing that the Indians were not competent to manage their own affairs so that the Government was required to undertake that management for them. The proviso of Article 7 served notice upon the Indians that the Government intended to invest, rather than pay over, the bulk of the proceeds which, after the treaty was carried out, would be the Indians' only remaining capital.*

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* The same treaty which specified that the President on consultation might determine how much of the proceeds

As stated in the dissenting opinion (A. 78):

> . . . the possibility that the President might have immediately turned over the whole $172,000 to the Indians, if it had been paid in 1857, without retaining any for investment . . . is, of course, a theoretical possibility, but it seems very unlikely as a practical matter. The President would not hand over to these dependent Indians more than they needed or could properly use for day-to-day expenses; nor could the Tribe expect to receive more than this.

The minority inference from the treaty language is in fact borne out by the evidence, since as appears from the report of the General Accounting Office, only a small part (approximately 15%) of the proceeds actually received from the land sales were turned over to the Indians. The sum of $59,641.45 was disbursed to the Indians and most of the remainder was invested in bonds.** (A. 91-4, General Accounting Office Report) The same General Accounting Office Report shows that when some of the state bonds were stolen while in the custody of the Secretary of the Interior, the loss was made good. By the Act of July 12, 1862, 12 Stat. 539, 540, the funds represented by the stolen bonds were replaced by a credit in the United States Treasury which was to earn interest at the rate of 5 percent per annum. Thus, as actually carried out by the Government in the years immediately following the treaty, most of the funds realized from the land sales were invested to return interest. When the bonds in which the funds were invested were stolen from

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* (Continued)
of the sale be paid and how much invested, also provided for the expenditure of the capital represented by the Indians' permanent annuities which were being commuted. (Article 6-7, A. 105-6)

** Apparently in state bonds bearing interest at 6% (A. 93).

the Government's custody, they were replaced by an interest-bearing fund in the United States Treasury.

It thus appears that the United States regarded its obligation under the 1854 treaty as one to invest or to pay a return as though funds were invested. A similar return should have been earned on the amount by which the capital was reduced by the Government's breach of trust in this case. In private trust law, it is the duty of a trustee to invest funds so that they will be productive of income; if he fails to do so, he commits a breach of trust. II *Scott on Trusts* 1348, § 181; *Restatement of Trusts Second* 391, § 181. If the trustee breaches his trust by failing to invest, he will be liable for that "which he should have received," or the legal rate of interest. II *Scott on Torts* 1534, 1554, §§ 207.1, 211; *Restatement of Trusts Second* 469, 479, §§ 207, 211. The Government's attitude and its conduct show that it believed that it had assumed the normal obligation that a trustee assumes in similar situations. The majority of the Court of Claims erred in ignoring the purposes of the treaty and the standards of the obligation of a trustee in this instrument that the Government itself had recognized.*

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* The Court may be interested in knowing that Commissioner of Indian Affairs Manypenny, who negotiated the treaty here, also negotiated a similar treaty two weeks earlier with respect to a small reservation of the Iowa Indians, Article 5 of which is similar to Article 7 of the treaty here (10 Stat. 1069, 1070). In explaining the meaning of this provision to the Iowa, Commissioner Manypenny stated:

> The money they will get from the sales of their land will come in greater amount than they will require—he fix it in the treaty by investing what will not be required by their wants. [Journal of Conference with the Ioways, National Archives Microfilm, T494, Roll 4, Frames 0089-0093; typewritten copy filed as Petitioners' Exhibit No. 76, Indian Claims Commission, Docket No. 79-A]

### 3. DOUBTS, IF ANY, AS TO THE MEANING OF THE LANGUAGE OF THE TREATY ARE REQUIRED TO BE RESOLVED IN FAVOR OF THE INDIANS, NOT IN FAVOR OF THE GOVERNMENT.

Petitioners submit that the Court below erred in its construction of the treaty in two ways: first, it drew erroneous inferences from the use of the word "may" in Article 7, and second, it applied an improper rule of construction to resolve a supposed ambiguity.

Although the Court leaned heavily on the word "may" as allowing discretion and therefore subjecting the Government to no obligation, upon analysis it is apparent that the meaning of Article 7 is not affected if "shall" is substituted for "may", viz.:

> [I]t is agreed that the President may [shall], from time to time, and upon consultation with the Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested . . .

As to each dollar of receipts, whether the word be "may" or "shall", the President is authorized to "determine" only which of two alternatives should be followed, payment or investment. It is not contended, and cannot reasonably be contended, that the President could by refusal to "determine" at all, leave receipts both unpaid and uninvested.

In the majority opinion, the word "may" is contrasted with the "clear and explicit language" necessary to express "an affirmative, clear-cut obligation" to invest, or to pay interest. Thus the treaty provision in question was deemed to be ambiguous, or at least not "clear and explicit", and the Court then applied the rule of strict construction of the sovereign's liability for interest.

Petitioners submit that Article 7 is quite clear and explicit and not subject to the uncertainties found by the Court below. Money obtained from the land sales was in part to be paid over and in part invested, leaving it in the President's discretion to determine the shares to be assigned to each category.

However, if there be any doubt as to the intention of the parties to the instrument, the Court below chose the rule which applies to ordinary contracts and claims against the United States, completely ignoring the rule which this Court has consistently applied to Indian treaties.

The dissenting opinion summed up the proper rule as follows:

> In resolving this question, we must remember that Indian treaties "are not to be interpreted narrowly, as sometimes may be writing expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." *United States* v. *Shoshone Indians,* 304 U.S. 111, 116 (1938). "[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' *Tulee* v. *Washington,* 315 U.S. 681, 684-5." *Choctaw Nation* v. *United States,* 318 U.S. 423, 432 (1943).[1]

[1] The Supreme Court has often indicated that, where possible, such treaties are to be interpreted liberally in favor of the Indians. See *The Kansas Indians,* 5 Wall. (72 U.S.) 737, 760 (1866); *Choctaw Nation* v. *United States,* 119 U.S. 1, 27-28; *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899); *Minnesota* v. *Hitchcock,* 185 U.S. 373, 396 (1902). *United States* v. *Winans,* 198 U.S. 371, 380-81 (1905).

The decision below is in direct conflict with the prevailing law governing Indian treaties. The majority's construction takes a supposedly doubtful provision and construes it in a way which relieves the Government of liability for a deliberate breach of trust, to the damage of the Indian party to the treaty.

* * *

The rules of construction of contracts generally also favor petitioners' interpretation.

As is said in 17 Am Jur 2d 643 (Contracts § 250), ". . . it is widely held that where the language of a promisor may be understood in more senses than one, it is to be construed in the sense in which he had reason to suppose that it was understood by the promisee." Or as it is put at 17 Am Jur 2d 688 (Contracts, § 275):

> It is often said that, if other things are equal, an interpretation most beneficial to the promisee will be adopted when the terms of an instrument and the relationship of the parties leave it doubtful whether words are used in an enlarged or restricted sense. Conversely it is said that everything is to be taken most strongly against the party on whom the obligation of the contract rests, or that contracts are to be construed in favor of the promisee and against the promisor. * * *
>
> It is also said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist.

In the case at bar, the defendant is both the promisor and the party who drafted the instrument.

In the following section (17 Am Jur 2d 689, Contracts § 276), it is stated that:

> It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who has selected the language * * *

and

> Also, in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it * * *

which in the case at bar is the Government.*

**5. THE PROPER MEASURE OF DAMAGES FOR THE GOVERNMENT'S BREACH OF ARTICLE 7 IS THE INTEREST WHICH WOULD HAVE BEEN EARNED HAD THE GOVERNMENT COMPLIED WITH THE TREATY PROVISION.**

As the dissenters noted, "that the directive to invest [in Article 7] referred to 'safe and profitable *stocks*', with 'the *interest*' to be paid over to or expended for the Tribe (emphasis added)" (A. 77), is equivalent to an agreement to pay interest (A. 77-78):

> To borrow the language of the Supreme Court in the *Blackfeather* case, *supra*, 155 U.S. at 172, "While this is not literally an agreement to pay interest, it has substantially that effect." In *Blackfeather*, the provision was in the form of an annuity measured by five percent on the Indians' money, but the Court looked through this shell to see that the treaty-parties intended the Indians to receive the normal proceeds from their funds. Here the treaty refers to "stocks" and "interest" from those stocks, but it seems clear that the signatories likewise desired the Indians to receive the increment normally earned (if they were not to have the money in their own hands). For some years before this 1854 treaty, the Federal Government had construed similar agreements calling for investments in "safe and profitable stocks" yielding "interest" of not less than five per cent as being satisfied by an appropriation, from year to year, of a sum equal to five percent interest. See Annual Report of the Commissioner of Indian Affairs, Nov. 30,

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* These rules should be considered in light of the fact that the Indian delegates who signed the treaty were illiterate (A. 108) as was the interpreter who translated the treaty for them. (A. 108)

1852, p. 10 (H. Dock. 1, pp. 300-01); Annual Report of the Commissioner of Indian Affairs, 1853, pp. 10-12 (H. Doc. 1, p. 263).[3] The only change in the 1854 treaty was the deletion of the specific reference to five percent; the reason for this change seems to have been the wish to assure the Indians the possibility of a greater amount obtainable from private investments, not to cut off the Indians right to the fair proceeds of their moneys which were retained by the Government and not handed over to them. *Ibid.* That right was preserved.

As *noted above* (page 13), the standard for measuring damages by reason of a failure of a private trustee to invest is similarly that which he should have received, or the legal rate of interest.

As noted in the General Accounting Office Report (A. 91-94), on such funds as were invested by the Government pursuant to Article 7 of the treaty (being 85% of the proceeds of sale), the petitioners actually received 6 percent through 1860 and 5 percent thereafter. The rate of interest which the Government has paid on Indian funds (and as noted by the dissenters in the above passage, obligations to invest in safe and profitable stocks were considered in the 1850's to be the equivalent of covenants by the United States to pay interest on such funds) is 5%, except that for a period from November 9, 1934 the rate was reduced to 4% because of the depression. *Alcea Band of Tillamooks,* 115 C. Cls. 463, 518 (1950), reversed on other grounds, 341 U.S. 48. The statute presently provides for 4% on Indian trust funds. 25 U.S.C. 161a.

There has been no suggestion that, assuming that the United States is obligated by Article 7 to invest, any lower standard is applicable, that any lower standard would be in accord with the authorities, or would be just. As this Court said in *Mille Lac Chippewas* v. *United States,* 229 U.S. 498, 509:

> As before stated, the lands not within the proviso were disposed of, not under the act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights. This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle it is as if the lands had been disposed of conformably to the act of 1889, and the net proceeds placed in the trust fund created by § 7, and the government then had used the money, not for the benefit of the Indians, but for some wholly different purpose.

What is the resulting loss for which the Indians are entitled to recover? ". . . [T]he prices that would have been controlling had the act of 1889 been rightly applied", including interest, and such was assessed on remand. 51 C. Cls. 400.

## CONCLUSION

Petitioners respectfully submit that this Court should reverse the decision of the Court of Claims and should remand this case to the Indian Claims Commission with directions to enter an additional judgment in favor of petitioners for interest, on $172,726.04, at the rate of 6 percent from June 1857, the date of the last sales, through 1860; 5 percent from 1860 to November 9, 1934, and such rate of interest the Court deems appropriate thereafter.

Respectfully submitted,

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No. 219

# In the Supreme Court of the United States

OCTOBER TERM, 1967

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, ET AL.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The majority and dissenting opinions of the Court of Claims (A. 68–81) are reported at 369 F. 2d 1001. The opinion of the Indian Claims Commission (A. 53–66) is reported at 15 Ind. Cl. Comm. 123.

### JURISDICTION

The judgment of the Court of Claims was entered on December 16, 1966 (A. 2). A petition for rehearing was denied on March 17, 1967 (A. 101). The peti-

tion for a writ of certiorari was filed on June 5, 1967, and was granted on October 9, 1967. The jurisdiction of this Court is invoked under 25 U.S.C. 70s(c) and 28 U.S.C. 1255(1).

### TREATY INVOLVED

The Treaty of May 30, 1854, (10 Stat. 1082) between the United States and petitioners is set forth in the Appendix at pp. 101–109.

### QUESTION PRESENTED

An Indian treaty provided that the President, upon consultation with the Indians, was to turn over to them some portion of the proceeds from the sale of their lands, and to invest the remainder in safe and profitable stocks for their benefit. The question presented is whether that provision requires the payment of interest on a judgment against the United States compensating the Indians for the low price realized upon the sale of the lands.

### STATEMENT

By the Treaty of May 30, 1854, (10 Stat. 1082; A. 101–109), the Peoria Tribe[1] ceded to the United States certain tracts of land, embracing some 350,000 acres, in what is now the State of Kansas. From the aggregate cession, the treaty reserved to the Indians 160 acres for each member of the tribe and 10 sections to be held as the common property of the tribe

[1] Petitioners, the Peoria Tribe of Indians of Oklahoma, were formerly known as the Confederated Tribe of the Peoria, Kaskaskia, Wea and Piankeshaw Indians (A. 4).

(Article 2). Pursuant to that reservation, more than 140,000 acres were selected for retention by the Indians in the manner prescribed in Article 3 (A. 38). Article 4 provided that the remaining lands, which proved to be approximately 208,585 acres (A. 38), were to be offered for sale at public auction and that those not so sold should be subject to private entry at the minimum price of public lands, subject to further reductions in price from time to time. The United States agreed to pay to the Indians the moneys arising from the sales after deducting survey, management and sale costs. The method by which such payment should be made was specified in Article 7, which provided in relevant part:

> * * * And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

The execution of the treaty coincided with the organization of Kansas as a territory (10 Stat. 277) and the extension to the territory of the provisions of the pre-emption law under which settlers could acquire title to unoccupied public lands at $1.25 per acre. In a remarkably short period of time, the territory was widely overrun by both *bona fide* settlers and land speculators who staked claims to lands, in-

cluding lands that were to be held for sale under the Peoria treaty (A. 36). In consequence, by the time the surveying and appraisal preliminary to sale had been completed, it was recognized that sale at public auction might in many cases involve the ouster of settlers who, in reliance on the pre-emption law, had chosen land, made improvements, commenced farming and the like. So tense did this situation become as the time for sale approached that the federal garrison at Fort Leavenworth was alerted to the possible need for military assistance in the conduct of the sales (A. 39). In all events, it appears that settlers, and perhaps others, were permitted to buy land at the appraised prices rather than at genuine auction prices. The sale was conducted from June 24, 1857 to July 13, 1857; during that period, 207,758.85 acres were sold for a total $346,671.09 or an average of $1.67 per acre. (A. 42). It is undisputed that that sum was appropriately applied for petitioners' benefit in accordance with the treaty.

After detailed examination of the circumstances surrounding the sale and of the prices at which land subsequently sold, the Indian Claims Commission concluded that "a fair market value for the parcels which were sold in June and July, 1857, would have averaged $2.50 per acre," that the sale should therefore have produced an aggregate of $519,397.13, and that petitioners are entitled to recover the difference between that and the amount actually received, *i.e.*, $172,726.04 (A. 65). The Commission denied petitioners' claim for interest on that award, noting: "The rule is well es-

tablished that the United States is immune from the burden of interest, in the absence of a contractual or statutory requirement. * * * There is no contract or statutory requirement for the payment of interest in this case" (A. 66). The Court of Claims affirmed (A. 68–81).[2]

## SUMMARY OF ARGUMENT

It is well settled that the United States is not liable for interest, except on claims for just compensation under the Fifth Amendment, unless it has expressly consented to such liability by treaty, statute or contract. Petitioners do not challenge that rule; nor do they contend that their underlying claim is one arising under the Fifth Amendment. Furthermore, the government's general immunity from interest is subject to no special exception in favor of Indians. Neither any supposed fiduciary relationship between the United States and Indian tribes nor any provision of Indian Claims Act relieves Indian claims from the traditional rule that interest on claims against the United States cannot be recovered in the absence of express assent to such liability by statute or contract. Accordingly, this case presents only the narrow question whether the Treaty of 1854 provides such assent.

The language in the Treaty of 1854, on which petitioners ultimately rely, provides that the President may from time to time, and in consultation with the Indians, determine how much of the proceeds of the

[2] Two judges dissented from the denial of interest (A. 75–81). Petitioners also challenged another aspect of the Commission's decision which is not in issue here.

sales of the former Indian lands shall be paid to the Indians and how much shall be "invested in safe and profitable stocks, the interest to be annually paid to them" (Article 7). We urge, first, that this provision does not constitute an undertaking by the United States to pay interest, but rather an undertaking to manage an investment portfolio for the Indians. In this respect the Treaty of 1854 is to be distinguished from numerous other treaties providing for the payment of interest at specified rates on funds deposited in the federal Treasury which clearly carry an obligation by the United States to pay interest. Indeed, there is persuasive evidence that the Treaty of 1854 reflected a policy decision that it was a mistake to retain Indian funds in the Treasury, that investing the principal of such funds in the securities of the States would be good for the economy and would relieve the federal government of the burden of annual interest payments. If, as we believe, the Treaty of 1854 did not obligate the United States to pay interest at all, it clearly did not obligate it to pay interest in the circumstances presented here.

Even if the treaty should be deemed an undertaking to pay interest, we urge, secondly, that it does not authorize the imposition of interest on the present award. At most the treaty authorized the payment of interest (a) on the proceeds received from the sale of land, (b) which are allocated by the President for investment rather than to be paid over to the Indians, and (c) which are actually invested. The underlying award on which interest is sought here satisfies none

of those conditions. It would be speculation to attempt to determine what proportion of the award would have been allocated for investment had it been available in 1857—a matter that Congress left to the President's discretion. It would also be conjecture to attempt to determine what income would have been realized had some or all of the award been invested in 1857. The investments that were actually made produced the highly variable results that even the most prudently purchased securities encounter. Not only were there purchases of State bonds paying widely varying rates of interest, but some of the States whose bonds were held defaulted on them. The conjecture and surmise involved in attempting to determine the amount of interest that the treaty authorizes serve to demonstrate that Congress has not made the United States liable for interest in these circumstances.

The problem is not the result of any ambiguity in the treaty which could be resolved by resort to canons of construction. Rather, the difficulty is precisely that the treaty clearly does not provide for these circumstances, that the limited conditions upon which the payment of interest is authorized do not obtain here and, hence, that the treaty fails to supply the congressional assent that petitioners require. The situation is in no way altered by the fact that the failure to satisfy the conditions of the treaty results from the failure of the United States to sell the lands in the prescribed manner. Every claim against the United States is predicated on some dereliction or default, but a liability for interest arises only where there is

express provision therefor. The Treaty of 1854 makes no such provision.

## ARGUMENT

### CONGRESS HAS NOT ASSUMED A LIABILITY TO PAY INTEREST IN THIS CASE

#### A. INTEREST MAY BE CHARGED AGAINST THE UNITED STATES ONLY WHEN CONGRESS EXPLICITLY ASSUMES SUCH OBLIGATION.

The law is clear, and is not here challenged, that the United States is not liable for interest on claims unless it has, by contract or statute, expressly consented in "affirmative, clear-cut, unambiguous" terms. *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585, 590; *United States* v. *Goltra,* 312 U.S. 203, 207. Recognizing this immunity as an aspect of sovereign immunity which can be waived only by congressional consent, this Court has held that "[c]ourts lack the power to award interest against the United States" except where authorized by "express language in a statute or contract." *United States* v. *N.Y. Rayon Importing Co.,* 329 U.S. 654, 663. Cf. *United States* v. *Shaw,* 309 U.S. 495, 500–501; *Minnesota* v. *United States,* 305 U.S. 382, 388–389; *Case* v. *Terrell,* 11 Wall. 199. The only qualification to the rule is that interest has been regarded as an element of the constitutionally required just compensation for the taking of property under the Fifth Amendment. *Smyth* v. *United States,* 302 U.S. 329, 353; *Albrecht* v. *United States,* 329 U.S. 599; *Seaboard Air Line Railway* v. *United States,* 261 U.S. 299, 306; *United States* v. *Creek Nation,* 295 U.S.

103, 111.[3] But no such claim under the Fifth Amendment is asserted in this case (A. 72).

No exception to this immunity has been recognized with respect to the claims of Indian tribes. Indian claims, like all others, have invariably been limited by "the 'traditional rule' that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract." *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48, 49. Accord, *Cherokee Nation* v. *United States,* 270 U.S. 476, 486–496; *United States* v. *Omaha Tribe of Indians,* 253 U.S. 275, 281–283; *Loyal Creek Indians* v. *United States,* 118 C. Cls. 373, 97 F. Supp. 426, certiorari denied, 342 U.S. 813; *Pawnee Indian Tribe of Oklahoma* v. *United States,* 157 C. Cls. 134, 138–140, certiorari denied, 370 U.S. 918; *Confederated Salish & Kootenai Tribes* v. *United States,* 175 C. Cls. 451, certorari denied, 385 U.S. 921; *Nez Perce Tribe of Indians* v. *United States,* 176 C. Cls. 815, 829–830, certiorari denied, 386 U.S. 984. Nor is the rule relaxed by reason of any fiduciary relationship between the United States and Indian tribes. Indeed, the general principles of the law of trusts, to which petitioners repeatedly allude (Br. for Petitioners, pp. 3, 6, 9, 13) clearly have no relevance here, since the enforceable

[3] On the other hand, neither a statute nor a contract providing for "just compensation" is deemed sufficiently explicit to authorize an award of interest. *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585; *United States* v. *Goltra,* 312 U.S. 203.

duties and liabilities of the United States, unlike those of a private trustee, are measured by specific language in acts or treaties and not by rules of courts of equity. See *Iowa Tribe of the Iowa Reservation in Oklahoma* v. *United States,* Ct. Cls. No. 9–65, decided March 17, 1967, certiorari denied, October 16, 1967, No. 221, this Term; *Skokomish Indian Tribe* v. *France,* 269 F. 2d 555, 560 (C.A. 9). Finally, petitioners do not suggest that the Indian Claims Commission Act itself constitutes a congressional waiver of the government's immunity to liability for interest; nor would any language in the Act or the decisions under it warrant such a suggestion. See *Pawnee Indian Tribe of Oklahoma* v. *United States, supra; Confederated Salish & Kootenai Tribes* v. *United States, supra; Nez Perce Tribe of Indians* v. *United States, supra.*

Against this background it may be seen that the issue presented for decision here is very narrow: Did the Treaty of 1854 constitute an affirmative undertaking to pay interest on money which has now been held to be owed petitioners? No other treaty, act or contract is relied on. And no right to interest could be conferred by the conduct—or even the dereliction—of federal officers in the absence of such an undertaking. See *United States* v. *N.Y. Rayon Importing Co.,* 329 U.S. at 660–661. We therefore turn to the Treaty of 1854.

B. THE TREATY OF 1854 DID NOT OBLIGATE THE UNITED STATES TO PAY INTEREST

1. Petitioners' ultimate reliance is on the following language of Article 7 of the Treaty of 1954 (10 Stat. 1084):

> * * * it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them * * *.

On its face, this is not an undertaking by the United States to pay interest; rather it appears to be an undertaking prudently to invest some portion of the tribe's money and to pay over whatever income is realized.[4] In contrast, many other Indian treaties did provide for the payment of interest by the United States at specified rates on funds deposited in the federal Treasury;[5] such treaties unmistakably constituted obligations of the United States for the interest specified. *United States* v. *Blackfeather,* 155 U.S. 180.

The dissenting opinon below argues (A. 77–78) that,

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[4] We do not, of course, quarrel with the proposition that the terms "stocks" and "interest" should be understood to include bonds or other securities and dividends or other income, respectively.

[5] The treaty of August 1831 (7 Stat. 355, 357) with the Shawnee Indians, which was construed in *United States* v. *Blackfeather, supra,* provided that the proceeds of the sale of certain lands, after specified deductions, should "constitute a fund * * * on

notwithstanding its apparent meaning, Article 7 should be read as obligating the United States for interest because, prior to 1854, "the Federal Government construed similar agreements calling for investment in 'safe and profitable stocks' yielding 'interest' of not less than five percent as being satisfied by an appropriation, from year to year, of a sum equal to five percent interest. See Annual Report of the Commissioner of Indian Affairs, Nov. 30, 1852, p. 10 (H. Doc. 1, pp. 300–01); Annual Report of the Commissioner of Indian Affairs, 1853, pp. 10–12 (H. Doc. 1, p. 263)." But the conclusion does not follow from the premise. One can usually satisfy a debt by alternative methods—equivalent or more advantageous than the method specified—although the creditor cannot compel it. Thus, assuming the obligation to invest could be discharged by annually appropriating a sum equivalent to the yield the investment would have earned, this does not mean that the Indian beneficiaries had an enforceable claim for payments in lieu of bond interest, binding upon the federal Treasury. What is more, the very reports of the Commissioner of Indian Affairs cited by the dissent below led to a change of approach. In both of the reports cited, the Commissioner suggested discontinuing the practice of holding Indian funds in the Treasury. He urged that ac-

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which the United States agree to pay to the chiefs * * * five percentum * * * as an annuity." See, also, Agreement with the Nez Perce Indians, 28 Stat. 326, 329, considered in *Nez Perce Tribe of Indians* v. *United States*, *supra;* Act of January 14, 1889, 25 Stat. 642, 645 considered in *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498.

tually investing the principal would be advantageous, "first, in absorbing a considerable portion of the present large and useless surplus of funds accumulated in the treasury"; second, "in relieving the government from the payment of the immense sums which the annual interest and payments on the above-stated principals must eventually amount to"; and third, in "diffusing, as it would, a considerable sum throughout the country" thereby benefiting "the States whose stocks might be selected," as well as "the community generally" and "keeping at home" securities "which might otherwise have to be sent abroad." Report of the Commissioner of Indian Affairs, November 26, 1853, S. Doc. 1, 33d Cong., 1st Sess., p. 263.

The policy recommended by the Commissioner in 1852 and 1853 was adopted and followed for many years thereafter.[6] The Peoria treaty did not prescribe a five percent interest rate, apparently because of "the possibility of a greater amount obtainable from private investments" (A. 78). A substantial portion of the proceeds of the land sales were invested in the bonds of various States and at various rates of return. See Def.'s Exh. 9–13, pp. 117–118. The investments thus made were not, of course, immune from the risks to which securities generally are subject. In several instances, particularly during the Civil War, States whose bonds had been purchased defaulted. See Letter

[6] The Act of April 1, 1880 (21 Stat. 70) marked a return to the earlier practice. It authorized the deposit of Indian funds in the Treasury to earn interest at the rate specified in the several treaties, or if none were specified, at the rate "prescribed by law."

from the Commissioner of Indian Affairs, May 23, 1864, S. Mis. Doc. No. 117, 38th Cong., 1st Sess.; Letter of the Secretary of the Interior, June 24, 1864, S. Mis. Doc. No. 133, 38th Cong., 1st Sess., p. 3. While Congress eventually indemnified Indians for the losses occasioned by those defaults (see Def.'s Exh. 9–13, pp. 117–118), such appropriations were a matter of grace and were in no way required under the 1854 treaty.[7]

In sum, we submit that under Article 7 of the Treaty of 1854, the United States undertook to manage an investment portfolio. It did not obligate itself to pay interest at any stated rate or at all. On the contrary, the treaty reflected a clear determination to avoid obligating the Treasury for interest payments. In these circumstances, the court below and the Indian Claims Commission were surely correct in concluding that the treaty does not support petitioners' demand for interest, over a period of 110 years, on the $172,726.04 awarded them.

2. Even if we were to assume that Article 7 is an undertaking to ~~invest~~ pay interest on funds rather than an undertaking to ~~pay interest on~~ invest them, we submit that the treaty does not authorize the allowance of interest on the underlying award in this case. There remain several obstacles.

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[7] Similarly, Congress appropriated $169,686.75 to replace securities that had been stolen (12 Stat. 539–540 (1862)). At least in the absence of custodial negligence, we do not suppose that the United States was obligated to indemnify the Indians for the stolen securities.

At the outset, it is not immediately apparent that an obligation to pay interest on retained proceeds received from the sale of lands survives to the present award, which does not represent money that was received by the United States, but, rather, money that should have been received and was not. Since Article 7 is concerned only with the proceeds of the sale and makes no provision with respect to the disposition of other funds, it affords no guidance here.

Notwithstanding this difficulty, if the treaty had included an express and unequivocal command to pay interest at a specified rate, it would be a simple arithmetic exercise to determine the amount that should have been earned. *United States* v. *Blackfeather,* 155 U.S. at 192–193. But the command of Article 7, if it is a command, is not of that sort.[8] The amounts that were to be invested and the amounts that were to be paid out to the Indians were left to be determined by the President "from time to time, and upon consultation with said Indians." The dissenting opinion below (A. 78) suggested that it was "very unlikely" that

[8] We do not urge, and the court below did not hold, that Article 7 left the President free to do nothing with the money—neither investing it nor turning it over to the Indians (see A. 77 n. 2). It is, nonetheless, indicative of the scope of the discretion conferred upon the President that a discretionary authority to withhold funds, independent of that provided in Article 7, is contained in Article 9 (A. 106): "* * * And should any of said Indians become intemperate or abandoned, and waste their property, the President may withhold any moneys due or payable to such, and cause them to be paid, expended or applied, so as to ensure the benefit thereof to their families." Article 9 would not seem to require the investment of funds being held for "intemperate or abandoned" Indians.

the President would have paid over the $172,000, had it been available in 1857, "without retaining any for investment." But it is also unlikely that the President would have invested the whole amount, since the allocation of the total fund between the short-term and long-term needs of the tribe was undoubtedly influenced by the size of the fund. Petitioners' contention, which we do not dispute, that the President was obliged to exercise his discretion in a manner most favorable to the Indians (Br. for Petitioners, pp. 7–8), only begs the question; it cannot tell us what allocation could reasonably have been deemed most favorable. Whatever the likelihood of any particular allocation, however, the critical fact is that it is impossible to do more than speculate as to what would have happened had a larger fund been available. The imposition of a liability for interest predicated on such a conjecture would be wholly inconsistent with the rule discussed above (pp. 8–11, *supra*) that interest is payable only on the authority of an explicit and unequivocal congressional mandate. See *Nez Perce Tribe of Indians* v. *United States*, 176 Ct. Cl. at 830. The Treaty of 1854 supplies no such authority.

Furthermore, even if one could divine the proportion of the present award that the President would have allocated for investment, had it been available in 1857, there is no way by which we can determine how the money would have been invested—in what securities, at what rate, and with what success. As we have noted above (p. 14, *supra*), the bonds that were purchased bore various interest rates. Some fell into

default. Others were sold at premiums. We need not elaborate on the fact that the actual results of the most prudent investments cannot be predicted with complete confidence. Here again, petitioners' claim rests on the sort of conjecture and surmise that cannot support the imposition of a liability for interest on the United States. Indeed, the most vivid demonstration that the Treaty of 1854 does not support their claim is contained in the very words of petitioners' prayer. Petitioners request this Court to direct the entry of "an additional judgment * * * for interest, on $172,726.04, at the rate of 6 percent from June 1857, the date of the last sales, through 1860; 5 percent from 1860 to November 9, 1934, and such rate of interest the Court deems appropriate thereafter" (Brief for Petitioners, p. 19). The Treaty, however, says nothing about interest at 6 percent or at 5 percent, much less at such rate as the Court deems appropriate. The fact that it is impossible to determine what rate of interest is authorized is a strong indication that Congress has not made the United States liable for interest in this case.

3. The difficulty in finding support for petitioners' claim in Article 7 is not the result of any ambiguity or obscurity in the language of the treaty and cannot, therefore, be obviated by resort to canons of construction. Petitioners' contention (Brief, pp. 15–17) that the treaty must be construed against the party that drew it seems to us beside the point because there is really no doubt as to what the treaty means. The difficulty is precisely that the treaty does not

provide for the circumstances presented here and cannot be made to do so by any reasonable process of interpretation. The treaty authorizes the payment of the interest realized in an explicitly defined set of circumstances that do not obtain here. The fund involved here was not received for the sale of land; it was not allocated by the President for investment; and it was not invested. The fact that the failure to satisfy those preconditions is attributable to the failure of the United States to sell the lands in the manner prescribed by the treaty cannot support the conclusion that Congress made the United States liable for interest in circumstances not contemplated by the treaty. Every claim against the United States is based on some dereliction or default, but interest as an element of damages is not recoverable in the absence of explicit assent. Since Article 7 makes no provision for the present situation, the case is no different than one in which the United States wrongfully fails to make a payment for which it is liable. Clearly a judgment for interest on the principal sum may not be entered in such a case. *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654; *Albrecht* v. *United States*, 329 U.S. 599; *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48; *Cherokee Nation* v. *United States*, 270 U.S. 476, 491.

Were this an action between private parties for money due, the failure of the underlying agreement to provide for interest on the claim would be no obstacle to a judicial award of interest. See *Miller* v. *Robertson*, 266 U.S. 243, 257–258; *Royal Indemnity Co.*

v. *United States*, 313 U.S. 289. But that is not the situation. The sovereign immunity of the United States exempts it from liability for interest on claims against it unless and until Congress expressly waives that exemption. Congress has not done so here.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Claims should be affirmed.

Respectfully submitted.

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In the

# Supreme Court of the United States

OCTOBER TERM, 1967

*No. 219*

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to the United States Court of Claims

Petition for Certiorari Filed June 5, 1967

Certiorari Granted October 9, 1967

## REPLY BRIEF

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## REPLY BRIEF

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The Government first argues the undisputed rule (which in part is a rule of construction) that the Government is not liable for interest on claims in the absence of an "affirmative, clear-cut, unambiguous" provision therefor in the treaty, statute or contract sued upon. The Government

chooses to redefine for petitioners the nature of their claim in order to attempt to force this case into the rule. Petitioners do not seek "interest on a claim," but rather damages, measured by interest, for failure to invest under the express provisions of Article 7, proceeds which would have been received but for the Government's deliberate breach. The Government argues that Article 7 was merely an agreement to invest whatever might have been actually received.

In order to make this argument, the Government must distinguish the *Mille Lac* (229 U.S. 498) and *Blackfeather* (155 U.S. 180) cases, both of which hold that agreements to pay a return cover not only funds actually received but also funds which the Government should have received. In its brief, the *Mille Lac* case, which is the closest to the case at bar, is referred to only in a footnote without discussion, and the *Blackfeather* case is distinguished on the ground (p. 12) that a rate of interest was specified in the Shawnee treaty there under consideration.

The *Mille Lac* and *Blackfeather* cases are the same as this case insofar as they hold that provisions respecting the employment of the Indians' capital extend to funds which should have been received as well as those which were actually received. The absence of a specified rate of return from the Indians' capital in the Peoria treaty was, as noted in Judge Davis' dissent (A. 78), apparently "to assure the Indians the possibility of a greater amount obtainable from private investments, not to cut off the Indians' right to the fair proceeds of their money which were retained by the Government and not handed over to them [Citation]. That right was preserved."

The Government attempts to use the fact that a rate of return is not specified and we cannot know with complete certainty what the results would have been had the Government in good faith complied with the provision to invest the proceeds of what should have been received in "safe and profitable stocks." That we do not know,

states the Government, "in what securities, at what rate, and with what success" the Indians' money would have been invested is "a strong indication that Congress has not made the United States liable for interest in this case."

The fact that we cannot have complete certainty on the results that actual investment would have produced has no bearing on either the intent of Congress (which is expressed unambiguously in the treaty, as the Government elsewhere concedes) nor on the Indians' right to recover, nor on the ascertainability of damages. The Government has overlooked the well established rules, cited in petitioners' original brief (p. 13), for ascertaining damages in such cases. The general trust law requires that damages for failure to invest be that which would have been received, or the legal rate of interest. The Government, as a self-appointed trustee, can certainly be held to the same standard in terms of either, at a minimum, the interest which it itself paid on Indian trust funds, or the larger amount that might have been realized by investment. That a trustee could escape liability for failure to invest is unthinkable. The standard set forth in this treaty is "safe and profitable stocks," and the minimum standards should certainly be the rate of interest actually paid on Indian trust funds by the Government. The ascertainability of damages in this kind of problem is one of the most easily soluble damage problems in law and in any event trustees have not been known to escape *liability* on the ground that damages are not calculable by the application of a predetermined arithmetical formula.

In connection with the ascertainment of damages it should be noted that the Government misconstrues Judge Davis' dissenting opinion with respect to the measure of damages. Judge Davis noted (A. 77-78) that in the 1850's the Government treated agreements to invest in

safe and profitable stocks as satisfied by the appropriation of five percent interest from time to time, thus showing that five percent interest was treated by the Government as the equivalent, and this affords the Court a standard for measuring damages. On pages 11-13 of its brief, the Government says that the Indian creditors could not compel the Government to pay interest rather than invest in stocks, and that the Commissioner of Indian Affairs wanted to change the policy of appropriating the interest rather than purchasing the stocks. Petitioners are not attempting to compel the Government to do something now or to argue the merits of the Government's policy in the 1850's. The point about the Government's conduct in the 1850's is that it provides a standard to measure damages for failure to invest.

The Government argues (pp. 16-17) that we do not know how much of the $172,000 the President would have determined to invest and how much he would have determined to pay over, because allocation is allegedly influenced by the size of the fund. The Government has failed to take into account the matters cited by petitioners, demonstrating that the standard on which the President was to make an allocation under the treaty was to pay over to the Indians only so much as they actually needed, and to invest the balance. On the funds which actually were realized from the sale, the determination was made that the actual needs of the Indians were satisfied by a small portion, $59,641.45, of the receipts. It would thus appear that the determination of their needs was already made, and the funds which should have been realized were therefore in the category of those funds which were to be invested. It should also be noted, however, that in fact the fund here in question was neither paid over nor invested and, therefore, regardless of the standard by which the allocation was to be made, the Indians lost the benefit of the income which should have been earned had the treaty been complied with.

The Government's final argument is that the treaty "does not provide" for the circumstances presented here. "The fund involved here was not received for the sale of land; it was not allocated by the President for investment; and it was not invested." In part, this is a repetition of the argument noted above, and is inconsistent with the holding of the *Blackfeather* and *Mille Lac* case that provisions for investment apply to funds which should have been as well as those which were actually received. In part, it is an argument that the treaty does not contemplate that the Government would breach it. But the purpose of these proceedings is to put the Indians in the position they would have enjoyed had the Government complied with the treaty. It has already been established that if the Government had complied, it would have realized $172,726.04 in 1857. It is further evident that, if the Government had realized this additional sum, the treaty required that it be paid over or invested. It was not realized; it was not paid over or invested. The Indians have suffered the loss of the resulting income and they are entitled by reason of the affirmative, explicit and clear-cut provision of the treaty to recover as damages the income their money should have earned.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

No. 219.—October Term, 1967.

The Peoria Tribe of Indians of Oklahoma et al., Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Claims.

[April 1, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

On May 30, 1854, the Peoria Tribe of Indians of Oklahoma, petitioner,[1] and the United States, respondent, entered into a treaty under which the Tribe reserved a portion of its lands and ceded the remainder, amounting to some 208,585 acres, to be sold at public auction by the United States for the Tribe's benefit. 10 Stat. 1082. This was provided for in Article 4 of the treaty:

> "[T]he President shall immediately cause the residue of the ceded lands to be offered for sale at public auction. . . . And in consideration of the cessions hereinbefore made, the United States agree to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same."

Article 7 of the treaty further provided:

> "And as the amount of the annual receipts from the sales of the their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said

[1] The petitioner was previously known as the Confederated Tribe of the Peoria, Kaskaskia, Wea and Piankeshaw Indians.

sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement."

In this case the Indian Claims Commission found that the United States violated the treaty in 1857 by selling most of the ceded lands, some 207,759 acres, not by public auction, but by private sales at appraised prices lower than would have prevailed at public auction. The Commission found that the United States thus received for the lands $172,726 less than it would have received if the sales had been made as required by the treaty. 15 Ind. Cl. Comm. 123. Neither party questions these findings.

The petitioner, however, sought review in the Court of Claims upon the issue of the measure of its damages for the treaty's violation—contending that by virtue of Article 7 of the treaty, the United States is liable not only for the $172,726, but in addition for the amount that that sum would have produced if "invested in safe and profitable stocks, the interest to be annually paid. . . ."[2] The Court of Claims, two judges dissenting, rejected this contention, 369 F. 2d 1001, and we granted certiorari to consider it. 389 U. S. 814.

In supporting the judgment of the Court of Claims, the respondent relies heavily upon the general rule that the United States is not liable for interest on claims

[2] The parties are agreed that "the terms 'stocks' and 'interest' should be understood to include bonds or other securities and dividends or other income, respectively." Respondent's brief, p. 11, n. 4. The term "stocks" was used in other treaties of the period to refer to what would today be called bonds. See, *e. g., Cherokee Nation* v. *United States,* 270 U. S. 476, 492. See also Report of the Commissioner of Indian Affairs, November 26, 1853, H. Doc. No. 1, 33d Cong., 1st Sess., 243, 263. The investments actually made pursuant to the treaty in the present case were purchases of state bonds.

against it.[3] This general rule, as the respondent points out, has been held to be fully applicable to the claims of Indian tribes.[4] But this is not a case where the Court is asked to exercise "the power to award interest against the United States," *United States* v. *New York Rayon Importing Co.*, 329 U. S. 654, 663. The issue, rather, concerns the measure of damages for the treaty's violation in the light of the Government's obligations under that treaty.

Under Article 7 of the treaty, the United States could at any time pay to the Tribe all or any part of the proceeds received from the sales of the lands at public auction. But until the proceeds were paid over, the United States was obligated to invest them and pay the annual income to the Tribe. The United States was not free merely to hold the proceeds without investing them. The issue in this case, therefore, is whether the obligation of the United States to invest unpaid proceeds applies to proceeds which, by virtue of the United States' violation of the treaty, were never in fact received.

Our decision is largely controlled by *United States* v. *Blackfeather*, 155 U. S. 180. There an 1831 treaty obligated the United States to sell certain Indian lands at public auction and to place all proceeds in excess of a stated amount in a fund for the benefit of the Indians. The fund could be dissolved and paid over to the Indians "during the pleasure of Congress," but until its dissolution, the United States was obligated to pay the Indians an "annuity" upon the retained fund. The lands were sold and the proceeds were paid to the Indians in 1852.

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[3] See, *e. g.*, *United States* v. *Thayer-West Point Hotel Co.*, 329 U. S. 585; *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654; *United States* v. *Goltra*, 312 U. S. 203.

[4] See, *e. g.*, *United States* v. *Alcea Band of Tillamooks*, 341 U. S. 48; *United States* v. *Omaha Tribe of Indians*, 253 U. S. 275, 283; *Confederated Salish & Kootenai Tribes* v. *United States*, 175 Ct. Cl. 451.

In 1893 the Court of Claims held that the United States had violated the treaty by selling some of the lands at private sales rather than at public auction, resulting in the realization of lower prices.[5] This Court held that the obligation to pay the "annuity" applied to the differential that would have been received if the lands had been sold at public auction in accord with the treaty, and that this obligation extended beyond the dissolution of the fund by Congress in 1852:

> "While the treaty bound the government to pay a five per cent annuity until the dissolution of the fund, which dissolution took place September 28, 1852, when the sum of $37,180.58, the amount of the fund resulting from actual sales, was paid over to the chiefs of the tribe, this dissolution terminated the stipulation for the annuity only *pro tanto*. If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity continues until the money is paid over. . . . 155 U. S., at 193.

Similarly in the case before us, we hold that the obligation to invest the $172,726 and to pay its annual income to the Tribe "continues until the money is paid over." Cf. *United States* v. *Mille Lac Chippewas*, 229 U. S. 498. As the dissenting opinion in the Court of Claims rightly pointed out,

> "Indian treaties 'are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.' *United States* v. *Sho-*

[5] *Blackfeather* v. *United States*, 28 Ct. Cl. 447.

*shone Tribe*, 304 U. S. 111, 116 . . . (1938). '[T]hey are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee* v. *Washington*, 315 U. S. 681, 684–85 . . . .'" 369 F. 2d, at 1006–1007.

Since the Indian Claims Commission and the Court of Claims erroneously held that the United States is not liable for its failure to invest the proceeds that would have been received had the United States not violated the treaty, they had no occasion to determine the measure of damages resulting from this liability. Accordingly, we remand this case to the Court of Claims for further remand to the Indian Claims Commission in order to determine that question.[6]

The judgment of the Court of Claims is reversed and the case is remanded for further proceedings consistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[6] The respondent did not brief or argue the question of how to measure these damages. The petitioner suggested that these damages might be measured by looking to the rate of interest which the United States has paid on Indian funds over the same period, arguing for this approach by analogy to private trust law. The petitioner also points out that Congress at one time considered the United States' treaty obligations to "invest in safe and profitable stocks" satisfied by an annual appropriation for the Indians of an amount equivalent to an interest payment. See Report of the Commissioner of Indian Affairs, November 30, 1852, S. Doc. No. 1, 32d Cong., 2d Sess., 293, 300–301; Report of the Commissioner of Indian Affairs, November 26, 1853, *supra*, n. 2.

Because the United States is not liable for interest on judgments in the absence of an express consent thereto, it cannot be liable for interest on the annual income payments not made. Therefore, if an interest rate measure is adopted by the Commission, it must be simple and not compound interest.